Supreme Court, U.S.
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No. 10-941

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IN THE

Supreme Court of the United States

DERRICK O'NEAL MASON,

Petitioner,

—v.—

RICHARD F. ALLEN, Commissioner,
Alabama Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

In this capital case, the Eleventh Circuit affirmed the district court's denial of Petitioner Derrick O'Neal Mason's Amended Habeas Petition. The Eleventh Circuit found that Mr. Mason's Sixth Amendment right to confront witnesses against him was violated by the admission of hearsay statements from an anonymous witness, but that the admission of those statements constituted harmless error; that this Court's decision in *Stone v. Powell* barred federal review of whether Mr. Mason's arrest on a misdemeanor warrant was a pretext to conduct a custodial interrogation regarding the homicide and search of Mr. Mason's car; and that Mr. Mason's claims that his custodial statements were obtained in violation of *Miranda v. Arizona* were procedurally defaulted. The questions presented are as follows:

1. Whether the Eleventh Circuit properly held—in conflict with the decisions of this Court and other circuits—that the admission of out-of-court statements made by an anonymous witness, who was a co-conspirator, constituted harmless error, where the trial court originally admitted statements that Mr. Mason was "out of control" and "trying to make a name for himself" for non-hearsay purposes to purportedly explain the "sequence of events."

2. Whether the Eleventh Circuit properly held that Mr. Mason's Fourth Amendment claims were precluded from consideration under *Stone v. Powell*, where Mr. Mason's claim that his arrest on a fifteen-month-old warrant for misdemeanor assault was merely a pretext to conduct a custo-

dial interrogation regarding the homicide and an inventory search of Mr. Mason's car, was summarily denied by the trial court and affirmed by the Alabama appellate courts without any legal or factual analysis.

3. Whether the Eleventh Circuit properly held that Mr. Mason's *Miranda v. Arizona* claims were procedurally defaulted, where Mr. Mason sufficiently presented to the trial court meritorious claims that he was subjected to improper questioning by law enforcement, was intoxicated and hungry, was psychologically coerced, and was misled by law enforcement, and where the *Miranda* claim was fairly presented to the Alabama appellate courts for review.

4. Whether the Eleventh Circuit properly denied a certificate of appealability on numerous constitutional claims, the success of all of which are at least debatable by a reasonable jurist, such as Mr. Mason's claims under *Batson v. Kentucky* for race-discrimination in his jury selection, for prosecutorial misconduct, that the trial court's findings and jury instructions relating to aggravators and mitigators were constitutional errors, for ineffective assistance of counsel at both the guilt and sentencing phases of his trial, and for an evidentiary hearing.

5. Whether the Alabama procedural rules that created an impediment to federal habeas review of several of Mr. Mason's meritorious claims were adequate as that term is defined in this Court's cases, where Mr. Mason's out-of-time appeal of his state post-conviction relief petition was not heard by the appellate courts despite procedural rules that provide for hearing such appeals.

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PETITION FOR WRIT OF CERTIORARI

Derrick O'Neal Mason respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App.1a, is reported at 605 F.3d 1114 (11th Cir. 2010). The order and opinion of the district court denying habeas relief, App.119a, 121a, are not reported. The order of the court of appeals granting the certificate of appealability, App.18a, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2010. App.1a. A timely petition for rehearing was denied on August 23, 2010. App.255a. On November 3, 2010, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including January 20, 2011. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted in the appendix at App.257a-65a.

STATEMENT OF THE CASE

This case raises exceptionally important questions concerning the rights of the accused, the conduct of police and prosecutors, and the role of the trial courts in excluding prejudicial testimony and improperly obtained evidence. As presented to the Eleventh Circuit, Mr. Mason's case contained four interrelated constitutional claims arising from a purported "informant" whose statements were admitted at trial through the testimony of a police officer and then used in the prosecution's closing arguments at both the guilt and sentencing phases, in violation of Mr. Mason's Sixth Amendment rights under the Confrontation Clause. While the Eleventh Circuit recognized that the hearsay statements were improperly admitted, it found that the error was harmless. The Eleventh Circuit based its harmless error decision on other evidence, all of which was obtained as a result of the "informant," whose identity was never revealed to Mr. Mason during the course of pretrial proceedings, who never testified at trial and in fact may have been a co-conspirator. The Eleventh Circuit's failure to recognize the relationship between the hearsay statements and the remaining evidence, and the resulting taint, constituted error. The court's decision directly conflicts with the decisions of this Court and other courts and exacerbates the uncertainty that already exists over the standards governing the harmless error rule. This case warrants certiorari to provide needed guidance in these critical areas of law.

A. Police Investigation

1. On March 27, 1994, Angela Michele Cagle was found in the back room of the Majik Mart convenience store, shot twice. R.E.421.[1] The next morning, an unidentified African-American male approached police at the crime scene and offered nonpublic details about the crime, including the make and caliber of the gun used in the murder. Over the course of the next two days, the tipster spoke with police at least four more times, always at times and locations of the tipster's choice. R.E.1489-95. Although the physical description of the last individual in the Majik Mart before the murder—a 5'6" or 5'7" African-American male of slight build—more closely matched the tipster, the tipster told police that Mr. Mason—a 6'3", 230-pound African-American man—had committed the crime. R.E.1497. Despite being "suspicious" of the tipster, the police apparently made no effort to determine whether the tipster had any connection to the crime, began referring to him as an "informant," and instead focused on finding a way to arrest Mr. Mason. On the evening of March 29, 1994, the tipster contacted police to tell them that Mr. Mason would soon be at the Hardee's drive-thru and described Mr. Mason's car. R.E.1500-02. Based on the informant's information, the police arrested Mr. Mason at approximately 10:00 p.m.

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[1] "R.E." refers to the records for this case in the Circuit Court of Madison County, Alabama, Case No. CC94-922LHL, as submitted to the United States Court of Appeals for the Eleventh Circuit on appeal of the denial of Mr. Mason's Amended Habeas Petition. "R." refers to additional records for this case as submitted to the United States District Court for the Northern District of Alabama in consideration of Mr. Mason's Amended Habeas Petition.

on a fifteen-month-old unexecuted misdemeanor warrant for third-degree assault and searched Mr. Mason's car finding a gun in the "console" between the seats. R.E.655.

2. After his arrest, Mr. Mason was held and interrogated continuously in a small storage room—by as many as five investigators at once—until the early morning hours of March 30. R.E.212. Although Mr. Mason was arrested on the misdemeanor assault warrant, he was interrogated only briefly on the assault, then on another robbery, and then interrogated at length on the murder without adequate warning. According to investigators, Mr. Mason then provided an oral statement that was handwritten by Investigator Parker, although Mr. Mason declined to sign the statement. Mr. Mason was not asked to sign a waiver of rights form. R.E.213. Law enforcement officers knew that Mr. Mason had been drinking alcohol and smoking marijuana that night, R.E.719, but testified that he appeared sober and proceeded to interrogate him. R.E.741. Mr. Mason remained in custody after he was interrogated, and the next morning, still appeared unable to follow simple instructions from the jailer. No audio or video recording of Mr. Mason's interrogation exists. R.E.670.

B. Trial Court Proceedings And Direct Appeal

1. Mr. Mason's trial counsel were Randy and Jackie Ferguson, a brother and sister team who each had less than five years of experience and neither had participated in a trial of any kind, let alone a capital murder case. They were not expe-

rienced criminal lawyers; their practice previously had focused on personal injury matters.

a. Before trial, Mr. Mason moved to suppress his custodial statement, R.E.211, and the results of the inventory search of his car following the illegal arrest. R.E.222. All of his motions were denied without the trial court putting any findings of fact on the record. R.E.755-56. Mr. Mason also sought the identity of the purported informant who named Mr. Mason, described his appearance, and told officers where to arrest him. In seeking to prepare for cross-examination of the purported informant, Mr. Mason made three motions to reveal the identity of any informants and also moved for discovery of prosecution files, records and information necessary to a fair trial, for the disclosure of impeaching evidence, and for the production of statements of individuals not to be called as witnesses. The trial court denied all of Mr. Mason's motions, however, holding that Mr. Mason, "shall not be permitted to discover or to inspect reports, memoranda, witness list[s] or other internal state documents made by the prosecutor . . . in connection with the investigation . . . or statements made by state witnesses or prospective state witnesses which are intended for use by the State as evidence at trial." R.E.394.

b. At trial, Investigator Renfroe testified at length to the statements from the purported informant. The trial court permitted the testimony, finding that the statements were not hearsay but were being admitted to describe the sequence of the police investigation. R.E.1510-20. But the prosecution repeatedly used the informant's out-of-court statements for their truth, however, argu-

ing at sentencing that Mr. Mason was "out of control" and "out to make a name for himself," and that he sought to "write a book" and profit from the crime. R.E.1494.

2. On June 16, 1995, Mr. Mason was convicted of the capital offense defined in Ala. Code § 13A-5-40(a)(2) (1975), in Madison County Circuit Court. R.E.418. On June 16, 1995 the jury voted 10-2 to sentence Mr. Mason to death. Only the minimum number of jurors required under Alabama law voted to sentence Mr. Mason to death, despite inclusion of the extremely prejudicial hearsay testimony and the prosecution's reference to that testimony at sentencing. The trial court accepted the jury's 10-2 sentencing recommendation and sentenced Mr. Mason to death. R.E.419.

3. On March 6, 1998, the Alabama Court of Criminal Appeals affirmed Mr. Mason's conviction and death sentence. App.36a. On April 7, 2000, the Alabama Supreme Court affirmed Mr. Mason's conviction and death sentence. App.101a. On November 13, 2000, this Court denied Mr. Mason's petition for a writ of certiorari. App.111a.

C. State Post-Conviction Proceedings

1. On October 17, 2001, Mr. Mason filed a Rule 32 petition in Madison County Circuit Court. *See* Ala. R. Crim. P. 32. The trial court declined to conduct an evidentiary hearing and on August 5, 2004, denied Mr. Mason's petition by adopting the State's 63-page proposed Order in its entirety.

2. Due to the trial court's clerical error, however, neither Mr. Mason nor the State were noti-

fied of the disposition of Mr. Mason's petition until April 26, 2005, well after the time for Mr. Mason to appeal under Alabama law had expired. On May 27, 2005, Mr. Mason filed a petition for writ of mandamus to the Honorable Bruce E. Williams, Circuit Judge for the Twenty-Third Judicial Circuit. Neither the trial court nor the State opposed the petition. On June 29, 2005, the Alabama Court of Criminal Appeals granted Mr. Mason's petition and ordered that the August 5th Order dismissing Mr. Mason's Rule 32 petition be vacated and a new order issued.

3. On July 7, 2005, the trial court once again entered the State's proposed order with the addition of an introductory section explaining the procedural posture described above. On July 14, 2005, Mr. Mason filed an Objection to the Court's Adoption of the State's Proposed Order Denying his Rule 32 Petition. The court overruled this objection and denied the petition on July 29, 2005. Mr. Mason then filed a Notice of Appeal of the denial of his Rule 32 Petition. On September 8, 2005, the Alabama Court of Criminal Appeals dismissed the petition. App.112a.

D. Federal Habeas Proceedings

1. On September 14, 2005, Mr. Mason filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Alabama, which he amended on January 16, 2007. R.E.73. On March 3, 2009, following briefing, Judge Virginia Emerson Hopkins dismissed the petition with prejudice, quoting pages of the State's brief, verbatim, in the memorandum opinion. App.121a. On May 14, 2009, Mr. Mason

applied to the district court for a certificate of appealability and was denied on all claims.

2. The Eleventh Circuit granted Mr. Mason's Application for a Certificate of Appealability on four issues relating to Mr. Mason's rights under the Confrontation Clause, the circumstances of his arrest on a fifteen-month-old misdemeanor warrant, the search of his automobile, and his rights under *Miranda v. Arizona*. The Eleventh Circuit affirmed the district court's denial of Mr. Mason's Amended Habeas Petition, holding that, while Mr. Mason's Sixth Amendment Confrontation Clause rights had been violated, the error was harmless when viewed in the context of the remaining evidence against him. App.11a-17a. The court also determined that Mr. Mason's Fourth Amendment claims were barred from habeas review by *Stone v. Powell*. App.7a-9a. The court finally held that Mr. Mason's claims arising under *Miranda v. Arizona* were procedurally defaulted. App.9a-11a.

REASONS FOR GRANTING THE WRIT

This case raises several critical issues related to standards of review and procedural requirements governing the federal courts' habeas review. Statutes and case law have imposed procedural hurdles that petitioners must clear in order to obtain substantive review of their death sentences in federal court. Because these procedural rules have the effect of precluding review of potentially meritorious claims, this Court has required appropriate procedural safeguards to be met in the state courts before the federal courts decline to review a claim. Claims arising under the Fourth

Amendment must receive full and fair consideration by the state court before *Stone v. Powell* can be invoked. A petitioner must exhaust all state court remedies before a claim can be presented to the federal courts. State procedural impediments that result in the procedural default of a claim must be "adequate" and consistently applied. No reasonable jurist could disagree with the district court holdings on a substantive claim in order for a court of appeals to deny a certificate of appealability. And, most importantly in this case, a constitutional error must not be harmless if relief is to be granted. The decisions in this case raise the specter that a man may be executed without full review of the interrelated constitutional errors that infected the jury selection, trial and sentencing. Certiorari is warranted to review several questions raised by these rulings.

The first question concerns harmless error analysis. This Court has reasoned that an error is not harmless if it had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). However, courts have been divided in determining how to apply that standard and whether the error is viewed in isolation for its prejudicial effect or in the context of the entire proceedings. The Eleventh Circuit found that Mr. Mason's Sixth Amendment Confrontation Clause rights had been violated when an informant's out-of-court statements were repeated by a police officer at trial and used by the prosecution during the sentencing phase to seek the death penalty, but that the error was harmless. The decision in this case conflicts with decisions by other courts of appeals in that

the Eleventh Circuit relied on a laundry list of evidence—evidence that was derived from the same out-of-court statements—to support Mr. Mason's conviction, while the Fifth and Second Circuits focus their analysis on the improperly admitted statements, the importance of those statements, and the repetition of those statements, as well as other evidence of guilt. *United States v. Gomez*, 617 F.3d 88 (2d Cir. 2010); *Fratta v. Quarterman*, 536 F.3d 485 (5th Cir. 2008). The Eleventh Circuit's decision relying on the weight of other evidence—the exclusion of any other factor—conflicts with decisions from other courts of appeals that other factors must be considered as part of the harmless error analysis.

The second question concerns precluding review of Fourth Amendment claims under *Stone v. Powell*. Other courts of appeals, including previous cases decided in the Eleventh Circuit, have held that where a petitioner avails himself of the opportunity for a full and fair hearing, review is precluded only if the hearing was in fact "full and fair." The Eleventh Circuit's decision conflicts with the Tenth and Fifth Circuits which have required state trial or appellate courts to clearly explain findings as to why the Fourth Amendment claims are denied. *Matthews v. Workman*, 577 F.3d 1175 (10th Cir. 2009); *Hughes v. Dretke*, 412 F.3d 582 (5th Cir. 2005). Mr. Mason's claims were deemed by the Eleventh Circuit to be precluded even though neither the trial court nor the Alabama Court of Criminal Appeals made any factual findings; this decision conflicts with decisions from other courts of appeals.

The third question concerns when a claim has been exhausted in state courts. This Court's decisions have consistently held that a petitioner must present his claim to one full round of the state's established appellate review procedures. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *Duncan v. Henry*, 513 U.S. 364, 365 (1995). Mr. Mason fairly presented his claims that his custodial statements should have been suppressed under *Miranda v. Arizona*, 384 U.S. 436 (1966), to the Alabama Court of Criminal Appeals and Alabama Supreme Court on direct appeal. However, the Eleventh Circuit's decision disregarded this Court's cases in holding that Mr. Mason did not exhaust his *Miranda* claim despite this fact.

The fourth question relates to when a court of appeals should issue a certificate of appealability ("COA") to review the denial of certain claims in a habeas petition. This Court's decisions make clear that a COA should issue where reasonable jurists would find the district court's assessment of the petitioner's claims debatable or wrong, or that reasonable jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Miller-El v. Cockrell*, 537 U.S. 322, 327, 338 (2003). Mr. Mason received a COA on several issues, however, the Eleventh Circuit declined to issue a COA on a number of meritorious, preserved claims, including violations of Mr. Mason's rights under *Batson v. Kentucky*, claims describing prosecutorial misconduct, claims regarding findings and jury instructions at the sentencing phase relating to aggravating and mitigating factors, ineffective assistance of counsel,

and the failure to provide Mr. Mason with an evidentiary hearing in the district court.

The final question relates to whether the Alabama rule that impeded Mr. Mason's appeal of the denial of his Rule 32 petition was adequate as that term has been defined by this Court. Alabama criminal procedure rules permit out-of-time appeals of the denial of post-conviction relief petitions. Those rules, however, have been inconsistently applied and, therefore, cannot be relied upon to bar federal review of claims. *Lee v. Kemna*, 534 U.S. 362, 376 (2002). Mr. Mason was not at fault for the failure of his counsel to meet this arbitrary procedural deadline and his counsel's failings should not operate to prejudice his substantive rights. *See also Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010).

These questions are immensely important not only to Mr. Mason, but also to the entire system of the federal review of state court death sentences. Mr. Mason represents one of thousands of federal habeas petitioners each year who face having meritorious claims for relief rejected due to procedural requirements placed before them. These requirements serve important functions in the development of the record by the state courts and the petitioners. However, where the petitioner has done his part to develop the record, yet state courts have failed in bearing their burden, the federal courts should not be precluded from reviewing important constitutional questions based only on the under-developed analysis of the state courts.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S DETERMINATION THAT THE VIOLATION OF MR. MASON'S CONFRONTATION CLAUSE RIGHTS WAS HARMLESS IS CONTRARY TO OTHER CIRCUIT COURT RULINGS

Under the test set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), an error is not harmless if it had a substantial and injurious effect or influence in determining the jury's verdict. The Fifth Circuit, in *Fratta v. Quarterman*, cautioned that in making such a determination, "the inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence." 536 F.3d 485, 510 (5th Cir. 2008) (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). The Fifth Circuit, therefore, reasoned that even though the properly admitted evidence—exclusive of the custodial statements which violated the Confrontation Clause—may have been sufficient to sustain a guilty verdict, that fact alone did not suffice to establish that the error in admitting the statements was harmless under *Brecht*. *Fratta*, 536 F.3d 485 at 510. The Eleventh Circuit, however—unlike the Fifth Circuit—undertook a harmless error analysis that reviewed the other evidence, including Mr. Mason's custodial statements that were obtained as a result of a pretextual arrest that was itself obtained by the anonymous witness' statements, and found the evidence sufficient to support Mr. Mason's conviction and sentence.

In *Fratta*, the petitioner claimed that his Sixth Amendment rights were violated when the court admitted custodial statements by two alleged co-conspirators through a police officer's testimony and admitted the testimony of one of the co-conspirator's girlfriends. *Id.* Fratta was convicted of capital murder and sentenced to death in Texas state court for arranging the murder of his wife. Although (1) several witnesses testified that Fratta had made statements about killing or having someone kill his wife, (2) the revolver used to kill Fratta's wife, which Fratta had purchased, was found in one of the co-conspirators' possession, (3) phone records showed that Fratta and one of the co-conspirators were in contact the day of the murder, and (4) $1,050 was found in Fratta's car the night of the murder, approximately the same amount each co-conspirator was to be paid for the killing, the Fifth Circuit held that the custodial statements admitted through a police officer's testimony, and the co-conspirator's girlfriend's testimony relaying how the crime occurred, could not be described as anything less than substantial. The Fifth Circuit noted that the State magnified the effect of those statements by highlighting and repeating them during closing argument and further acknowledged that the effect of the custodial statements were undoubtedly enhanced by the fact they were relayed through the testimony of a police officer "who could command the jury's respect." *Id.* at 511.

Similarly here, Investigator Renfroe's testimony regarding his discussions with the informant provided the motive for the crime, bolstered the prosecution's case and ultimately tied together the

events that followed. While the Eleventh Circuit looked to those events and the evidence flowing therefrom to support its ruling that the Confrontation Clause violation was harmless, the very fact that the informant voluntarily approached an officer at the crime scene, knew undisclosed information about the crime, led officers directly to Mr. Mason, and identified the brand and caliber of the weapon perfectly, tainted the evidence which the Eleventh Circuit now relies upon to support Mr. Mason's sentence. Yet, Mr. Mason's counsel, who filed numerous motions to uncover the identity of the informant, was barred from having any opportunity to question the informant regarding his involvement in the crime. This error could have significantly changed the trajectory of the case, particularly where the vote of only one juror could have changed Mr. Mason's sentence from death to life. *Duest v. Singletary*, 997 F.2d 1336, 1339 (11th Cir. 1993) (admission of prior conviction was not harmless error and warranted habeas relief due to likelihood that at least one juror who had recommended death penalty had been substantially influenced by error where jury recommended death by slim margin). If one is left in grave doubt regarding either a conviction or a sentencing, it should not stand. *Fratta*, 536 F.3d 485 at 510.

The Second Circuit in *United States v. Gomez*, 617 F.3d 88, 95 (2d Cir. 2010), weighed several factors, that the Eleventh Circuit here also reviewed, when determining whether a Confrontation Clause violation was harmless. The Second Circuit considered (1) the overall strength of the prosecutor's case; (2) the prosecutor's conduct with respect to the improperly admitted evi-

dence; (3) the importance of the wrongly admitted testimony; and (4) whether such evidence was cumulative of other properly admitted evidence. (quoting *United States v. Kaplan*, 490 F.3d 110, 123 (2d Cir. 2007)). The court in *Gomez* also concluded that testimony by a detective that a co-conspirator informed the detective that the defendant was his supplier was inadmissible hearsay. The court decided that the admission of such hearsay testimony was not harmless error and that the judge's limiting instruction did not correct the harm even considering other evidence regarding the defendant's involvement in the crime. The court held that the improperly admitted evidence had substantial weight precisely because it went to the core of the government's case against Gomez.

Likewise, the statements by the informant went to the core of Mr. Mason's case and were improperly repeated by the prosecution at closing during the guilt and sentencing phases. The other evidence, including Mr. Mason's custodial statements, which were obtained while Mr. Mason was intoxicated, had not eaten for hours and was being subjected to immense psychological coercion by a number of officers in a small 10-by 14-foot storage room, was flawed. The Eleventh Circuit gave significant weight to Mr. Mason's custodial statements, but as the Sixth Circuit held in *United States v. Moses*, 137 F.3d 894, 902 (6th Cir. 1998), such evidence is insufficient where its reliability is itself in question.

It cannot be said that the informant's statements that Mr. Mason was "out of control" and "out to make a name for himself" were not impor-

tant to the case, particularly where those statements were improperly repeated by the prosecutor in her closing at the guilt and sentencing phase and used to support a death sentence. It is a "basic premise" of the Confrontation Clause that certain kinds of hearsay "are at once so damaging, so suspect, and yet so difficult to discount that that jurors cannot be trusted to give such evidence the minimal weight it logically deserves *whatever* instructions the trial court might give." *Bruton v. United States*, 391 U.S. 123, 138 (1968) (Stewart, J. concurring) (emphasis added). This is so, particularly here, where the prosecutor not only amplified those statements, but extrapolated from those statements to falsely claim that Mr. Mason intended to write a book and profit from the crime. Although the Eleventh Circuit erred in its harmless error analysis, it at least acknowledged that "there was absolutely no evidence supporting that statement." App.16a.

The Eleventh Circuit reasoned, however, that Mr. Mason's defense counsel also used the informant's statements to Mr. Mason's benefit. There is simply no basis for that assertion in the record. Unlike the prosecution, defense counsel did not quote the informant. Defense counsel instead only pointed to truths about Mr. Mason's childhood and the fact that he had to use medication to control certain disorders that he had from birth. Such statements should not dilute the fact that the prosecution improperly used the hearsay in direct violation of the Confrontation Clause to seek the death penalty. Such conduct cannot be deemed harmless where it means the difference between life and death for Mr. Mason.

II. THE ELEVENTH CIRCUIT'S DECISION THAT MR. MASON'S PRETEXTUAL ARREST CLAIM WAS PRECLUDED FROM CONSIDERATION UNDER *STONE V. POWELL* WARRANTS THIS COURT'S REVIEW

Stone v. Powell, 428 U.S. 465 (1976), bars federal court consideration of Fourth Amendment claims only if the defendant had an adequate opportunity for full and fair litigation of those claims in state court. A petitioner has had the benefit of such an opportunity so long as (1) he apprised the state court of his Fourth Amendment claim along with the factual basis for that claim; (2) the state court carefully and thoroughly analyzed the facts; and (3) the court applied the proper law to those facts. *Miranda v. Leibach*, 394 F.3d 984, 997 (7th Cir. 2005). Mr. Mason's pretextual arrest claim is not barred by *Stone* because the state courts did not analyze or consider the evidence of pretext that he introduced at his suppression hearing.

Before trial, Mr. Mason argued that he had been arrested on a pretextual misdemeanor warrant so that the police could conduct a custodial interrogation of Mr. Mason for Ms. Cagle's murder. *See United States v. Lefkowitz*, 285 U.S. 452, 467 (1932), *overruled on other grounds by Illinois v. Gates*, 462 U.S. 213, 238 (1983) *and United States v. Whren*, 517 U.S. 806 (1996). Accordingly, Mr. Mason sought to suppress his custodial statements because they were made in connection with a pretextual arrest. At the suppression hearing, the arresting officers testified that they were aware that they did not have probable cause to

arrest Mr. Mason for Ms. Cagle's murder, but nonetheless intended to conduct a custodial interrogation of Mr. Mason for the crime. Notwithstanding this testimony, the trial court denied Mr. Mason's motion to suppress without making any factual findings or conducting any legal analysis as to whether such an admission tainted the fruits of that arrest. Mr. Mason's custodial statements and the search of his car were then used by the district court and Eleventh Circuit to deny habeas relief and to support Mr. Mason's death sentence, even though they were derived from the informant's statements and obtained as a result of an admittedly pretextual arrest. Under *Lefkowitz*, the fruits of that pretextual arrest should have been suppressed.

The Eleventh Circuit's decision was contrary to the law in the Fifth, Seventh, Tenth and Eleventh Circuits because neither the trial nor appellate court addressed in any way the admission from the police officers that the misdemeanor arrest was pretextual. *See Leibach,* 394 F.3d at 984 (reviewing complete transcript of proceedings before determining that claim was precluded under *Stone v. Powell*). Both the Tenth and Fifth Circuits have required either the trial court or a state appellate court to clearly explain findings as to why Fourth Amendment claims are denied in order to satisfy *Stone*'s opportunity to a full and fair hearing. *See Matthews v. Workman,* 577 F.3d 1175, 1194 (10th Cir. 2009); *Hughes v. Dretke,* 412 F.3d 582, 596 (5th Cir. 2005). In both *Matthews* and *Hughes*, the Tenth and Fifth Circuits permitted *Stone* preclusion only after determining that the state courts addressed and analyzed the

reasons for denying suppression. Similarly, the Eleventh Circuit has refused to condone *Stone* preclusion where neither the trial nor appellate court explicitly announced its reasoning on matters essential to a Fourth Amendment claim. See *Lawhorn v. Allen*, 519 F.3d 1272 (11th Cir. 2008); *Tukes v. Dugger*, 911 F.2d 508 (11th Cir. 1990).

This case presents a very narrow but important pretextual arrest issue: whether the police officers' *admitted* pretext should have provided a basis for suppression of the fruits of that arrest. Accordingly, this Court should grant certiorari to review whether the Eleventh Circuit correctly applied *Stone v. Powell*.

III. THE ELEVENTH CIRCUIT'S DECISION THAT IT COULD NOT ADDRESS MR. MASON'S *MIRANDA* CLAIM ON ITS MERITS WARRANTS THIS COURT'S REVIEW

Before trial, Mr. Mason moved to suppress his custodial statements under *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny. At his suppression hearing, Mr. Mason argued that "[t]he totality of the circumstances shows that the [alleged custodial] statement was involuntary and taken in violation of federal and state constitutional guarantees." R.E.214. At the suppression hearing, Mr. Mason's counsel elicited testimony that Mr. Mason was arrested on a pretextual third-degree misdemeanor warrant, was told by law enforcement that he would be questioned about the misdemeanor, had consumed alcohol and smoked marijuana before he was arrested,

and was berated by law enforcement and questioned at length, with no breaks, for several hours. At the suppression hearing, defense counsel further adduced evidence that although waiver forms were available, Mr. Mason had not signed one, and that although audio and video recording equipment was available, Mr. Mason's statements had not been recorded in any form.

The trial court summarily denied Mr. Mason's motion to suppress his custodial statements, and the Alabama Court of Criminal Appeals found that "[t]here was no evidence that the appellant was under the influence of drugs, or that his confession was coerced by inducement or threats," and found that Mr. Mason had knowingly and voluntarily waived his rights when making statements to the police. App.81a. Mr. Mason also presented his *Miranda* claim in an Application for Rehearing to the Alabama Court of Criminal Appeals and to the Alabama Supreme Court. Despite Mr. Mason's raising this claim to the state's highest court, the district court found that it could not reach the merits of Mr. Mason's *Miranda* claim because it had not been fully exhausted.

The federal court's decision was contrary to Supreme Court case law, which requires that a petitioner fairly present his claim to one full round of the state's established appellate review process. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *Duncan v. Henry*, 513 U.S. 364, 365 (1995). The Court of Criminal Appeals' references to the factual allegations of Mr. Mason's instant *Miranda* claim shows that Mr. Mason fairly pre-

sented his claim to that court.[2] *See Green v. Nelson*, 595 F.3d 1245, 1254 (11th Cir. 2010) (finding the petitioner's claim fairly presented because state court identified it in its decision). Accordingly, because Mr. Mason had fully exhausted his *Miranda* claim, the federal courts should have considered this claim on its merits.

IV. THE ELEVENTH CIRCUIT'S DECISION DENYING MR. MASON A CERTIFICATE OF APPEALABILITY ON SEVERAL OF HIS CONSTITUTIONAL CLAIMS WARRANTS THIS COURT'S REVIEW

Reasonable jurists could debate whether the district court properly decided Mr. Mason's claims under *Batson v. Kentucky*, 476 U.S. 79 (1986), for prosecutorial misconduct, for improper findings and jury charges relating to aggravating and mitigating factors, for ineffective assistance of counsel, and for an evidentiary hearing. Thus, the Eleventh Circuit should have issued a certificate of appealability ("COA") on these claims.

A petitioner seeking a COA need only demonstrate a substantial showing of a denial of a constitutional right. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). This standard is satisfied by demonstrating that reasonable jurists would find the district court's assessment of the petitioner's claims debatable or wrong, or that reasonable

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[2] The Court of Criminal Appeals reviewed the entire record for additional violations of Mr Mason's substantial rights, whether or not it was brought to their attention, and noted "[w]e find no plain error in either the guilt phase or in the sentencing phase of the proceedings." App.98a.

jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Id.* at 327, 338.

When the district court declines to address a petitioner's constitutional claim on procedural default grounds, a COA should issue when a petitioner shows that reasonable jurists could debate whether the habeas petition states a valid claim of denial of a constitutional right and whether the district court was correct in its procedural default ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

A. Reasonable Jurists Could Debate Whether The District Court Erred In Denying Mr. Mason Relief On His *Batson v. Kentucky* Claim

The district court determined that it could not review Mr. Mason's *Batson* claim because the claim had not been exhausted. Reasonable jurists could debate, however, whether Mr. Mason fairly presented this claim to the Alabama state courts and whether Mr. Mason has a valid *Batson* claim.

Here, Mr. Mason afforded the Alabama state courts on direct appeal a full and fair opportunity to address and resolve his *Batson* claim on its merits. Mr. Mason presented the overruled *Batson* objections to the Alabama Court of Criminal Appeals and the Alabama Supreme Court. R.E.976, 1114, 1168-69. Although the appellate courts did not analyze the *Batson* claim, they had a full and fair opportunity to review and correct the error and searched the record for error that adversely affected Mr. Mason's rights and found none. App.97a-100a, 110a.

Thus, reasonable jurists could debate whether the district court should have decided Mr. Mason's *Batson* claim on its merits. The district court's refusal to do so is particularly troubling given the validity of Mr. Mason's *Batson* claim. Here, the prosecution used peremptory challenges to remove six out of nine African-American jurors. R. 656-67. This pattern alone would cause reasonable jurists to debate whether the prosecution acted with a race-based reason when striking prospective jurors. *See Miller-El*, 537 U.S. at 342. The prosecution removed those jurors purportedly because of criminal backgrounds, reluctance about the death penalty, and a reticence to serve on the jury; however, similarly situated white jurors were not struck when they gave similar responses. Striking minority venire members based on answers which did not result in the striking of non-minority venire members would cause reasonable jurists to debate whether purposeful discrimination occurred. *Id.* at 344.

B. Reasonable Jurists Could Debate Whether The District Court Erred In Denying Mr. Mason Relief On His Prosecutorial Misconduct Claim

Reasonable jurists could find the district court's assessment of Mr. Mason's prosecutorial misconduct claim debatable or wrong. In his Amended Habeas Petition, Mr. Mason catalogued how, among other things, the prosecution improperly vouched for the credibility of the State's witnesses, made improper and incorrect statements of law and fact, mischaracterized testimony to the jury, and introduced racial bias and sexual assault to further inflame the jury to vote for the death

penalty. R.E.113-124. The district court conceded that "some of the reviewable comments made by the prosecutors in Mason's case during the guilt phase of trial were improper." App.231a-32a. The Eleventh Circuit further held that the prosecution made improper and incorrect statements of law and fact without any supporting record evidence at the guilt and sentencing phases of Mr. Mason's trial. App.12a-16a. The district court determined, however, that Mr. Mason was not entitled to habeas relief on this claim. App.15a-17a.

This Court has long recognized the need to curb misconduct by prosecutors, cautioning that while the prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). In *Berger*, this Court analyzed the totality of the prejudicial insinuations and arguments, assessed their combined effect, and ultimately concluded that the improper arguments tainted the trial, depriving the defendant of his right to a fair trial. *Id.* at 85-89.

Here, a reasonable jurist could debate whether the totality of the prosecution's improper statements to the jury warrant habeas relief. The prosecution engaged in extensive improper insinuation, speculation and argument about whether Ms. Cagle had been sexually assaulted and whether a "Negroid" hair found on Ms. Cagle's body was Mr. Mason's. The cumulative effect of these improper statements deprived Mr. Mason of his right to a fair sentencing hearing.

C. Reasonable Jurists Could Debate Whether The District Court Properly Denied Relief On Mr. Mason's Claims Regarding The Trial Court's Findings And Jury Instructions Concerning Aggravators And Mitigators At Sentencing

Reasonable jurists could debate whether the district court properly concluded that the "especially heinous, atrocious or cruel compared to other capital offenses" ("HAC") aggravator applied in this case, and whether the jury instructions on aggravators and mitigators were constitutionally sufficient.

The trial court listed several reasons to support its HAC finding, but they all boil down to recapitulations of the same circumstances: that Ms. Cagle was shot twice "execution-style," she was defenseless, and the robbery had been planned. *See* App.190a-94a. However, case law is clear that these circumstances are insufficient to establish the HAC aggravating factor. *Ex parte Clark*, 728 So.2d 1126, 1140-41 (Ala. 1998) (holding that a defendant's infliction of six gunshot wounds was not necessarily especially heinous, atrocious, or cruel); *see also Medlock v. Ward,* 200 F.3d 1314, 1324 (10th Cir. 2000) (Lucero, J., concurring) (to find that "especially heinous, atrocious or cruel" aggravator "based merely on the brief period of conscious suffering necessarily present in virtually all murders would fail to narrow the sentencer's discretion" as constitutionally required). Reasonable jurists could debate whether a rational factfinder could have concluded beyond a reasonable doubt that Ms. Cagle experienced the

extreme physical or psychological torture required under Alabama law to establish the HAC aggravating circumstance.[3]

Compounding the error, the trial court instructed the jury on aggravators and mitigators incorrectly, requiring it to find mitigators unanimously while permitting aggravators to be found by a less-than-unanimous jury. The district court found this claim to be procedurally defaulted, but Mr. Mason fairly presented this claim on direct appeal to the Alabama state courts by including it in his state appellate briefs in the context of his ineffective assistance of counsel claim. R.E.973, 1111, 1164. *See Beam v. Paskett*, 3 F.3d 1301, 1305-06 (9th Cir. 1993) (a constitutional claim is exhausted even if raised in the context of another claim, if the latter claim requires the state court to consider the former claim), *overruled on other grounds by Lunbright v. Stewart*, 191 F.3d 1181 (9th Cir. 1999).

Reasonable jurists could debate whether Mr. Mason has a valid claim. The State is required to prove every aggravating circumstance beyond a reasonable doubt, and the jury is required to find those aggravators unanimously. *See* Ala. Code

[3] At least the Tenth Circuit has reviewed a claim related to the sufficiency of a HAC finding even where more facts supported such a finding. *See, e.g., McCracken v. Gibson*, 268 F.3d 970, 975, 982 (10th Cir. 2001) (one victim was conscious and complaining to first responders of severe pain from gunshot wound to her head and two victims were aware that they would be shot next), *see also Hooker v. Mullin*, 293 F.3d 1232, 1236 (10th Cir. 2002) (granting COA to determine sufficiency of the evidence of conscious suffering where the medical examiner's opinion was equivocal).

§ 13A-5-45(e). Indeed, reasonable jurists could disagree whether the jury was even given an opportunity to find aggravators and mitigators correctly, because the trial court erroneously instructed the jury that it was required to find mitigators unanimously, while also erroneously instructing the jury that it did not have to find aggravating circumstances unanimously. R.1632-33, 1636. Ala. Code § 13A-5-45. Further compounding the error, the jury was not instructed that it had to find aggravators beyond a reasonable doubt. Ala. Code § 13A-5-45(e); *see also Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (any enhancement "that increases the penalty for a crime . . . must be submitted to a jury, and proved beyond a reasonable doubt.").

D. Reasonable Jurists Could Debate Whether The District Court Erred In Denying Mr. Mason Relief On His Ineffective Assistance Of Counsel Claim

The district court reviewed and rejected portions of Mr. Mason's ineffective assistance of counsel ("IAC") claims on their merits. For those portions of Mr. Mason's IAC claim that the district court reviewed on the merits, App.238a-50a, reasonable jurists could debate whether the district court should have granted relief. This Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), provided a two-part test to determine whether an accused has received ineffective assistance of counsel: (1) the defendant must show that counsel's performance was deficient and (2) the defendant must show that he was prejudiced by the

defense. Mr. Mason satisfied both of these elements.

First, Mr. Mason's trial counsel abdicated their duties as counsel in a number of respects. An attorney's performance is deficient if it falls below an objective standard of reasonableness. *Id.* at 687-88. Mr. Mason's trial counsel had no experience in capital murder cases and had never even tried a criminal case. Trial counsel failed to object to statements made by an informant that were introduced through police officer testimony, identifying the gun that was used, Mr. Mason as the shooter, and a motive for the shooting. The Eleventh Circuit found that admission of these statements violated the Confrontation Clause, App.15a, but trial counsel never objected to the admitted testimony.

These statements, along with statements bolstering the state's witnesses based on their prior experience, claiming that the prosecution had a "dual function" and in some way represented the defendant, providing fingerprint statistics to explain the lack of fingerprints in evidence and discussing other non-record evidence, were permitted without objection. Even the Alabama Supreme Court found that these statements were improper. App.103a-10a. Additionally, Mr. Mason's trial counsel did not object to the jury charge regarding the aggravating circumstance of "especially heinous, atrocious and cruel" even though there was no evidence to support this charge in the record.

The inadequate performance of Mr. Mason's trial counsel prejudiced the outcome of Mr. Mason's trial. By failing to object to out-of-court

statements, Mr. Mason was foreclosed from confronting the informant's statements that Mr. Mason "was out of control" and in possession of the weapon that killed Ms. Cagle. If Mr. Mason had the opportunity to cross-examine the informant, he could have questioned the informant's role as a co-conspirator. By allowing the prosecutor to make comments regarding the absence of fingerprints, the State's dual role as a representative of Mr. Mason, and the prosecutor's personal beliefs about how the murder was committed, trial counsel's incompetence prejudiced Mr. Mason. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (condemning arguments that diminish the jury's sense of responsibility in the sentencing phase of a capital murder trial); *Berger*, 295 U.S. at 84-85 (any reference to non-record information during closing argument is error).

E. Reasonable Jurists Could Debate Whether The District Court Erred In Denying Mr. Mason's Motion For An Evidentiary Hearing

The district court denied Mr. Mason's motion for an evidentiary hearing with neglible reasoning. Reasonable jurists, however, could find the district court's limited assessment of Mr. Mason's motion for an evidentiary hearing debatable or wrong.

In order to qualify for an evidentiary hearing, a petitioner must have made a reasonable attempt to develop the factual record in prior state court proceedings and the additional alleged facts, if proven at the hearing, would entitle the petitioner to relief. *See* 28 U.S.C. § 2254(e)(2). When deter-

mining whether a petitioner failed to develop his claims in state court, the focus is on whether the petitioner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims, not whether such efforts would have been successful. *Williams v. Taylor*, 529 U.S. 420, 435 (2000) (*Williams II*). If a defendant diligently sought, but was denied, the opportunity to present evidence in the state court proceedings, he should not be found to have failed to develop the relevant facts. *Id.* at 437.

Mr. Mason has been diligent in his efforts to develop the relevant facts throughout the state direct appeal and post-conviction proceedings. Mr. Mason's pre-trial investigation was hindered by the failure of the police and prosecution to disclose exculpatory evidence, preventing Mr. Mason from fully developing the factual bases of his claims at that stage. *Id.* at 434 (prosecution concealing certain facts can be an indication that a claim was pursued with diligence but remained undeveloped in state court).

The additional facts Mr. Mason alleged would, if proven, entitle Mr. Mason to relief on several of his claims. With respect to his IAC claim, an evidentiary hearing would allow Mr. Mason to demonstrate that his trial counsel did not properly and effectively investigate, research and prepare his case. Further, Mr. Mason would have presented evidence regarding the informant's involvement in the crime. Most critical yet, Mr. Mason would have proven the existence of mitigating circumstances, available to his trial counsel, that were not presented at the sentencing phase, such as Mr. Mason's involuntary intoxication on the

night of the crime and his troubled childhood, including evidence of sexual abuse at the hands of his babysitter's son. This evidence would have proven that trial counsel's performance fell far below "an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, which could be not construed as part of a "sound trial strategy," *id.* at 689, and was "so serious as to deprive the defendant of a fair trial . . . ." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). These additional factual allegations are similar to those proffered by the petitioner in *Turner v. Calderon*, 281 F.3d 851, 890-95 (9th Cir. 2002), where the Ninth Circuit issued a COA on the district court's failure to grant petitioner an evidentiary hearing on his ineffective assistance of counsel claim at the penalty phase. There, as here, the petitioner's counsel failed to introduce evidence concerning, among other things, the petitioner's intoxication and childhood problems. *Id.* at 893-95.

V. THE DETERMINATION THAT SEVERAL OF MR. MASON'S CLAIMS ARE PROCEDURALLY BARRED MERITS THIS COURT'S REVIEW

The district court determined that several of Mr. Mason's claims, including his IAC claims, *Batson* and jury selection claims, improper jury instruction claims, and failure to disclose exculpatory materials under *Brady v. Maryland*, 373 U.S. 83 (1963), were procedurally defaulted.

As discussed above, reasonable jurists could disagree that these issues were effectively presented to the Alabama courts such that the federal courts

would not be barred from considering the claims' merits on a habeas petition. Before determining that a claim is procedurally barred, the district court was required to analyze whether the state procedural rule that prevented the review constitutes an "adequate" basis for barring federal habeas review. *James v. Kentucky*, 466 U.S. 341, 348 (1984). To meet this requirement, a rule must be "firmly established and regularly followed." *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (citation omitted); *accord Beard v. Kindler*, 130 S. Ct. 612, 617 (2009); *James*, 466 U.S. 348. State procedural rules that impede federal habeas review must provide the defendant with fair notice and must not be arbitrary, inconsistent or unpredictable. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958); *see also NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-302 (1964).

The iteration of Rule 32.1 in place at the time of Mr. Mason's appeal is identical to the current Rule, which expressly provides for out-of-time appeals. Ala. R. Crim. P. 32.1(f) (2011) ("The petitioner failed to appeal within the prescribed time from the conviction or sentence itself or from the dismissal or denial of a petition previously filed pursuant to this rule and that failure was without fault on the petitioner's part."). Indeed, earlier, ambiguous versions of Rule 32.1(f) had been held to permit an out-of-time appeal. *Fountain v. State*, 842 So.2d 719, 721 (Ala. Crim. App. 2000), *aff'd in relevant part by Ex parte Fountain*, 842 So.2d 726 (Ala. 2001); *Marshall v. State*, 884 So.2d 898, 899 (Ala. Crim. App. 2002), *judgment rev'd by Marshall v. State*, 884 So.2d 900 (Ala. 2003); *Thompson v. State*, 860 So.2d 907, 909-10 (Ala.

Crim. App. 2002). However, that Rule has been inconsistently applied as observed by Judge Barkett in her dissent in *Maples v. Allen*, 586 F.3d 879, 895 (11th Cir. 2009) (the Alabama procedural rule regarding appeals of Rule 32 petitions "is not 'adequate' pursuant to the Supreme Court's definition of that term") (Barkett, J., dissenting); *see also Martin v. Walker*, 357 F. App'x 793 (9th Cir. 2010), *cert. granted*, No. 09-996, 2010 WL 621406 (U.S. June 21, 2010) (finding that federal review of alleged constitutional violations should not be barred because of state rules that are purportedly objective but inconsistently applied).

Mr. Mason's notice of appeal of the denial of his Rule 32 was filed four days late, as noted by the district court. The Alabama Court of Criminal Appeals declined to hear the appeal despite the fact that the plain text of Rule 32.1 permits out-of-time appeals. Mr. Mason himself was not at fault; he instructed his counsel to file the notice of appeal and believed that they had complied with his instructions. Mr. Mason must not be held responsible for his counsel's failures. *See Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010) (if a missed deadline cannot be constructively attributed to the petitioner, remedies such as equitable tolling are available). Further, Mr. Mason must not be held responsible for the Alabama courts' failure to consistently and uniformly apply procedural rules for post-conviction relief.

This Court should remand this case to the Eleventh Circuit for further consideration as to whether the procedural rules invoked to bar review of several of Mr. Mason's meritorious

claims are "adequate" under this Court's cases. In the alternative, this Court should stay this petition pending this Court's review of the petition for certiorari in *Maples v. Allen*, which invokes identical principles and the same procedural rule as this case, and the resolution of *Martin v. Walker*, which raises similar issues, and was argued before this Court on November 29, 2010.

VI. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT

The right of a criminal defendant to confront his accuser has "ancient roots" and is "a fundamental right essential to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 U.S. 400, 404 (1965). This Court in *Bruton*, 391 U.S. at 136-37, held that a limiting instruction was not an adequate substitute for a petitioner's constitutional right, and noted that courts cannot seek to "secure greater speed, economy and convenience in the administration of law at the price of fundamental principles of constitutional liberty." Although the lower courts made reference to other evidence that purportedly corroborates Mr. Mason's guilt, that evidence was derived solely from the purported informant and used by police officers to make a pretextual arrest. Mr. Mason's custodial statements would not have been admitted but for the pretextual arrest, which itself was derived only from the informant's statements. This case presents a unique Sixth Amendment issue: whether a Confrontation Clause violation can be deemed "harmless" where the evidence used to support a death sentence is itself derived from the very Confrontation Clause violation at issue.

Stone v. Powell bars federal court consideration of Fourth Amendment claims if the defendant had an adequate opportunity for full and fair litigation of those claims in state court. In order for "full and fair" consideration of a claim, the state court, whether at trial or on direct appeal, must make factual findings and the record must reflect legal analysis. *Agee v. White*, 809 F.2d 1487, 1491 (11th Cir. 1987).

The concept that the federal courts should be the "ultimate interpreter" of constitutional protections is a concept almost as old as the Constitution itself. *See Powell v. McCormack*, 395 U.S. 486, 549 (1969) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). The district court here, however, takes *Stone* too far. Although Mr. Mason elicited testimony that the police officers arrested him on a pretext, the state courts failed to consider this admission in denying suppression of the fruits of his pretextual arrest. Holding that *Stone* precludes federal habeas review in this case means that there has been no review—let alone a meaningful one—of a federal constitutional issue by either a state or federal court. Such a ruling would create an incentive for state courts to issue evidentiary rulings with no reference to any facts or law, and thereby insulate those decisions forever from federal review. Such a result would be just the first step in federal courts abdicating their responsibility to oversee state courts' application of federal law, and is inconsistent with the proper role of the federal judiciary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-12195
May 11, 2010

DERRICK O'NEAL MASON,

Petitioner-Appellant,

—v.—

RICHARD F. ALLEN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Patrick T. Campbell, Ona T. Wang, S. Jeanine Conley, Brian Keith Esser, Baker and Hostetler, New York City, *for Petitioner-Appellant.*

Beth Jackson Hughes, Montgomery, AL, *for Respondent-Appellee.*

Appeal from the United States District Court for the Northern District of Alabama.

Before:

DUBINA, *Chief Judge*, and
BARKETT and MARCUS, *Circuit Judges*.

PER CURIAM:

Derrick O'Neal Mason appeals from the denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Mason was convicted in 1998 for the murder of Angela Michele Cagle, who was found dead in the back room of a convenience store in Alabama on March 27, 1994. Mason became a suspect in the Cagle murder after an unidentified man told the police that Mason had committed the crime, described the gun used, and told the police that Mason "was out of control" and "trying to make a name for himself." A few days after the murder, on March 29, 1994, the unidentified informant led the police to Mason's car where Mason was arrested on an outstanding warrant for a misdemeanor assault. As part of an inventory search, police searched Mason's car and found a gun that laboratory results later indicated was the same gun used in Cagle's murder. After arresting Mason around 10:00 p.m., police held him in an interrogation room, first interrogating him on the

assault for which he was arrested, then on an unrelated prior robbery, and then on the murder at issue. Approximately two hours later, Mason confessed to committing the murder.

Mason was tried, found guilty, and the jury voted 10-2 to sentence him to death, a recommendation the trial court accepted. The Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Mason's conviction and death sentence in 1998 and 2000, respectively, and the United States Supreme Court denied Mason's petition for a writ of certiorari.

On October 17, 2001, Mason filed a Rule 32 petition in the Madison County Circuit Court, which was denied on July 7, 2005.[1] The Alabama Court of Criminal Appeals dismissed Mason's appeal of that decision, and the Alabama Supreme Court denied certiorari review. Mason then initiated federal habeas corpus proceedings in the Northern District of Alabama, and his petition was denied. After an unsuccessful motion to alter or amend the judgment, Mason filed a Notice of Appeal. This Court granted Mason's application for a Certificate of Appealability on the following issues:

- whether Mason's Fourth Amendment rights were violated by his pretextual arrest and the subsequent search of his vehicle;
- whether Mason's confession was coerced and therefore involuntary, in violation of the Fifth Amendment; and

[1] Due to a clerical error, neither Mason nor the government was notified of the trial court's original ruling, issued on August 5, 2004, until April of 2005, and the court reissued the denial on July 7, 2005

- whether Mason's rights under the Confrontation Clause were violated when a police officer testified to the allegedly hearsay statements made by the informant.

Standard of Review

We review the district court's conclusions on legal questions and mixed questions of law and fact *de novo* and its factual findings for clear error. *Rhode v. Hall,* 582 F.3d 1273, 1279 (11th Cir.2009). However, our review of the Alabama courts' decisions[2] are limited by the terms of 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996). *See* 28 U.S.C. § 2254; *Williams v. Taylor,* 529 U.S. 362, 402-03, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Under AEDPA, we accord a presumption of correctness to a state court's factual findings. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). We therefore grant habeas relief to a petitioner challenging a state court's factual findings only in those cases where the state court's decision "was based on an unreasonable determination of the facts in light of the

[2] When the last state court rendering judgment affirms without explanation, we presume that it rests on the reasons given in the last reasoned decision. *Ylst v. Nunnemaker,* 501 U S 797, 803-05, 111 S Ct 2590, 115 L Ed 2d 706 (1991), *Sweet v Sec'y, Dep't of Corrs* , 467 F.3d 1311, 1316-17 (11th Cir.2006)

evidence presented in the State court proceeding." § 2254(d)(2). *See Wiggins v. Smith*, 539 U.S. 510, 528-29, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

AEDPA similarly constrains our review of legal questions decided on the merits in state court. Under the statute, we cannot grant habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings" unless:

> [T]he adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

§ 2254(d). The Supreme Court has further explained the requirements of § 2254(d) as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13, 120 S.Ct. 1495. When, however, a claim is properly presented to the state court, but the state court does not adjudicate it on the merits, we review *de novo. Cone v. Bell,* ___ U.S. ___, 129 S.Ct. 1769, 1784, 173 L.Ed.2d 701 (2009).

If a petitioner fails to "properly" present his claim to the state court—by exhausting his claims and complying with the applicable state procedure—prior to bringing his federal habeas claim, then AEDPA typically bars us from reviewing the claim. Exhaustion requires that "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel,* 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999); *see* § 2254(b), (c). That is, to properly exhaust a claim, the petitioner must "fairly present[ ]" every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review. *Castille v. Peoples,* 489 U.S. 346, 351, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989) (quotation and emphasis omitted).

In the process of exhausting a claim, the petitioner must comply with all "independent and adequate" state procedures, or else the petitioner will have procedurally defaulted on that claim. *See Wainwright v. Sykes,* 433 U.S. 72, 86-87, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Bailey v. Nagle,* 172 F.3d 1299, 1302-03; § 2254(b),(c). Where a petitioner has not "*properly* . . . presented his claims to the state courts," he will have "procedurally defaulted his claims" in federal court. *O'Sullivan,* 526 U.S. at 848, 119 S.Ct. 1728. To

determine whether a state court's procedural ruling constitutes an independent and adequate state rule of decision, this court has set forth the following three-part test: (1) "the last state court rendering a judgment in the case must clearly and expressly state that it is relying on state procedural rules to resolve the federal claim without reaching the merits of that claim"[; (2)] the state court's decision must rest solidly on state law grounds, and may not be "intertwined with an interpretation of federal law[;]" and (3) the state procedural rule must not be applied in an arbitrary or unprecedented fashion. *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir.2001). We review *de novo* the district court's determination that a claim has been procedurally defaulted. *See Mize v. Hall*, 532 F.3d 1184, 1190 (11th Cir.2008).

Under this framework, we address each argument in turn.

Pretextual Arrest and Vehicle Search

Mason first argues that he was subjected to a pretextual arrest on a misdemeanor assault warrant, in violation of his Fourth Amendment rights, and, accordingly, the gun found in his vehicle in conjunction with this arrest should not have been admitted into evidence.[3] He also claims that the search of his vehicle was an improper inventory search, in violation of the Fourth Amendment. We find that *Stone v. Powell*, 428 U.S. 465, 96 S.Ct.

[3] For the first time on appeal, Mason also argues that the pretextual arrest violated his Fifth and Sixth Amendment rights Thus, because they were waived below, we decline to address these arguments

3037, 49 L.Ed.2d 1067 (1976), precludes our consideration of these arguments. In *Stone*, the Supreme Court narrowly delineated the scope of review over Fourth Amendment claims in federal habeas corpus actions brought under 28 U.S.C. § 2254. The Court held in that case that:

> where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

428 U.S. at 494, 96 S.Ct. 3037; *see Peoples v. Campbell*, 377 F.3d 1208, 1224-26 (11th Cir.2004) (holding that *Stone* precluded consideration on habeas review of claim alleging arrest lacked probable cause); *Bradley v. Nagle*, 212 F.3d 559, 564 (11th Cir.2000) (holding that *Stone* precluded consideration of claim alleging an invalid search).

Mason attempts to distinguish *Stone*, arguing that it should not be applied to his case because the state trial court did not engage in fact-finding on his claim that his pretextual arrest violated the Fourth Amendment. We do not find any merit to this argument, as Mason concedes that all the facts relevant to this claim are undisputed. *Bradley*, 212 F.3d at 565 ("[F]ull and fair consideration . . . includes at least one evidentiary hearing in a trial court and the availability of meaningful appellate review when there are facts in dispute, and full consideration by an appellate court when the facts are not in dispute.") (internal quotation marks omitted).

Nor can it be argued that the state appellate court failed to provide "full consideration" of Mason's claim challenging his arrest. The Alabama Court of Criminal Appeals, in discussing this claim, noted that Mason "d[id] not challenge the validity of the arrest warrant," and held that the officer's subjective intent in arresting Mason was irrelevant. *Mason v. State,* 768 So.2d 981, 1001 (Ala.Crim.App.1998). As long as the arrest was "objectively authorized," it was a valid arrest. *Id.* We note that the same result would obtain under *Whren v. United States,* 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (holding that an officer's "[s]ubjective intentions play no role" in the analysis of a Fourth Amendment claim).

Likewise, Mason presented to the state courts his argument that the inventory search of his car was unlawful and the claim received full and fair consideration. Mason's counsel cross-examined two police officers regarding the arrest and argued this claim to the trial court. On appeal, the Alabama Court of Criminal Appeals thoroughly analyzed this legal claim. *See Mason,* 768 So.2d at 996-99. Because Mason received "full and fair consideration" of these Fourth Amendment claims, we are precluded from considering them here. *Stone,* 428 U.S. at 494, 96 S.Ct. 3037.

Involuntary Confession

Next, Mason argues that his confession was involuntary because he was (1) subjected to improper questioning; (2) intoxicated and hungry during the interrogation; (3) psychologically

coerced, and (4) misled by law enforcement officers. Mason also argues that, due to this alleged coercion, he was unable to validly waive his right to not self-incriminate when *Miranda* warnings were read to him.[4] The government argues that the claim is procedurally defaulted and, in the alternative, that Mason was adequately advised of his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before being questioned about the murder.

On direct appeal, Mason did not include any allegations of coercion in his brief. Mason argued only the following to the state appellate court:

> Mason confessed to the third-degree assault, and as such any further questioning of Mason regarding other alleged incidents was in violation of his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The continued questioning of Mason after his alleged statement regarding the misdemeanor assault was in violation of his rights under *Miranda,* and as such, the alleged custodial statement should have been suppressed by the trial court.

In his Rule 32 petition, however, Mason alleged that police interrogators grabbed him, pinned him

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[4] Although Mason argues that Officer Renfroe did not read him his *Miranda* warnings before initiating questioning on the Cagle murder, the record shows that Officer Parker did read the *Miranda* warnings to Mason prior to questioning him on the murder. In total, Mason received *Miranda* warnings three times during the interrogation: before the questioning on the misdemeanor assault charge, again before being questioned on the robbery charge, and finally, before being questioned on the murder

down to his chair, and forced him to look at photographs (presumably of the crime scene), and argued that this conduct rendered his confession coerced and involuntary. The Rule 32 trial court found that this claim was procedurally defaulted under Alabama law because it could have been but was not raised on direct appeal. *See* Ala. R. Cr. P. 32.2(a)(5). The Alabama court's ruling is based on an independent and adequate ground, and Mason does not argue otherwise. Thus, Mason's claim that his confession was coerced was procedurally defaulted and therefore we cannot review it. 28 U.S.C. § 2254(b), (c). To the extent that Mason argues that the State failed to advise him of his *Miranda* rights, we find this claim refuted by the record. Accordingly, we cannot say that the state court's ruling on the legality of his confession is contrary to or an unreasonable application of clearly established federal law.

Confrontation Clause

Finally, Mason argues that his Sixth Amendment right to confront witnesses against him was violated, in both the guilt phase and the penalty phase of his trial, by the introduction of statements made to the police by an unidentified informant. The government counters that Mason failed to exhaust this claim and therefore AEDPA precludes federal court review. § 2254(b)(1)(A). In the alternative, the government argues that the out-of-court statements were not hearsay (i.e., they were not offered for the truth of the matter asserted) and, thus, no Sixth Amendment violation occurred.

Before trial, Mason made multiple motions to reveal the identity of the informant and for production of documents listing individuals whom the prosecution had interviewed but did not intend to call as witnesses. The trial court denied all of these motions. At trial, Investigator Harry Renfroe testified that the informant told him that Mason committed the murder, and that Mason was "out of control" and "out to make a name for himself." Mason did not make a contemporaneous objection. In closing argument during guilt phase, the prosecutor told the jury:

> Now, as a matter of law, information provided by a confidential informant is admissible . . . to the finders of the fact, you must simply take, because it has been held admissible, the information that the confidential informant provided, as a matter of law.
>
> This confidential informant, who is obviously known to this defendant, perhaps even a close friend of this defendant, said that he came to Investigator Renfroe because this young man, Derrick Mason, was out of control and wanting to make a name for himself on the streets.

In closing argument during the sentencing phase, the prosecution again referred to the informant's statements, telling the jury:

> [O]ne theme kept coming out . . . [at] some point in time, I believe one of the witnesses characterized it this way: At some point in time the defendant took a wrong turn. Took a wrong turn, became out of control. We heard that from more than one witness. Became out

> of control. There comes a time in all of our lives when we have to accept responsibility for what we do. . . .
>
> You heard him on the witness stand. He wants to be a leader, he hopes that he can get a life without parole in the penitentiary so he can be a role model for other young people. Ladies and gentlemen, we have got a lot of good role models, we don't need this defendant as a role model for our young people.
>
> And like all of the modern-day criminals, he wants to write a book, wants to profit from what's happened to him and the horror and the tragedy that he has inflicted upon another family, including his own family.

No evidence was presented, at either the guilt or penalty phase, to support the argument that Mason wanted to write a book based on his criminal conduct.

We first reject the government's argument that Mason failed to fairly present his Confrontation Clause argument to the state court and therefore failed to exhaust his claim.[5] However, the state

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[5] In his brief to the Alabama Criminal Court of Appeals, Mason alleged the following.

> The informant was allowed to not only supply information to Renfroe, but the informant's statements were presented in front of the jury Renfroe was allowed to testify that the informant told him that the weapon used was a 380 caliber, that the offender was Derrick Mason, and that Mason was "out of control and was trying to make a name for himself." . [T]he informant's testimony was clearly hearsay and Mason was deprived

court did not address the federal Sixth Amendment claim. Thus, we review this claim *de novo*. *Cone*, 129 S.Ct. at 1784.

At the time of Mason's trial, the law provided that the Confrontation Clause precludes the admission of hearsay statements from an unavailable witness unless the statements fall within a firmly rooted hearsay exception or contain a particularized guarantee of trustworthiness. *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).[6] The State concedes that the statements do not bear a particularized guarantee of trustworthiness or fall within a firmly rooted hearsay exception. Rather, the State argues that the statements are not hearsay at all because they were admitted to show a sequence of events, not for the truth of the matter asserted therein.

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of his Sixth Amendment right to confront the witness who accused him of this crime

Mason cited the Sixth Amendment as a legal basis for his argument and presented the factual allegations to make up a Sixth Amendment claim, which clearly alerted the state court that he was asserting a federal constitutional issue. *See Snowden v. Singletary*, 135 F.3d 732, 735-36 (11th Cir.1998) (holding that exhaustion requires only "mak[ing] the state court aware that the claims asserted present federal constitutional issues")

[6] Since *Roberts*, the Supreme Court has held that the Confrontation Clause forbids "testimonial" statements unless the defendant has the opportunity to cross-examine the declarant A statement is testimonial if it was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford v Washington*, 541 U S 36, 52, 124 S.Ct. 1354, 158 L Ed.2d 177 (2004) (quotation omitted).

The record, however, belies the State's assertion. The prosecutor clearly used the hearsay statements to establish the truth of the matter asserted. In addition to the manner in which the testimony was presented, the prosecutor, in closing, told the jury they must accept the hearsay testimony "because it has been held admissible . . . *as a matter of law.*" (emphasis added). Worst of all, during the penalty phase, the prosecutor told the jury as a matter of fact that Mason wanted to write a book without a scintilla of evidence in the record to support such an assertion. It is clear that the prosecutor relied on these statements during closing arguments for the truth of the matter asserted therein at both the guilt phase and the sentencing phase, violating Mason's rights under the Confrontation Clause.

However, notwithstanding the Confrontation Clause violation, we cannot reverse a conviction or order a new sentencing hearing if the error is harmless. *United States v. Mills,* 138 F.3d 928, 938 (11th Cir.1998). Whether an error is harmless is a mixed question of law and fact that we review *de novo. See Smith v. Singletary,* 61 F.3d 815, 817 (11th Cir.1995) (per curiam). In habeas proceedings, we review whether a constitutional violation is harmless by determining "whether the error had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *see also Sims v. Singletary,* 155 F.3d 1297, 1315 (11th Cir.1998) (citation omitted). To show prejudice under *Brecht,* there must be "more than a reasonable possibility that the error contributed to the [conviction or] sen-

tence." *Horsley v. State of Ala.*, 45 F.3d 1486, 1493 (11th Cir.1995); *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710. We analyze the effect of the Confrontation Clause violation by looking at several factors, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, . . . and, of course, the overall strength of the prosecution's case." *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

Under this standard, Mason cannot show the prejudice required in order to reverse his conviction. Mason confessed to the murder shortly after being arrested, and the murder weapon was found in his car. Mason's confession was thorough and described in detail the murder scene found by the officers. When viewed in light of the overall strength of the prosecution's case and the presence of corroborating evidence, we cannot say that there was "more than a reasonable possibility that the [Confrontation Clause] error contributed to the [conviction]." *Horsley*, 45 F.3d at 1493.

As to the sentencing phase, Mason appears to argue that the statement that he was out of control was prejudicial because it tended to support the "heinous, atrocious, and cruel" aggravating factor. Although we find that the statement was improperly admitted and that the prosecutor wrongfully argued to the jury that Mason intended to write a book when there was absolutely no evidence supporting that statement, we cannot say that the prosecutor's erroneous conduct had a "substantial and injurious effect" on the

jury's death recommendation in light of the nature of the crime and the mitigating evidence presented.

Even without the improper testimony and argument, there was sufficient evidence to support the heinous, atrocious, and cruel aggravating factor. Mason himself presented testimony that he lacked the ability to control his behavior. Mason's family also testified that at times they could not control Mason, and that they put him on various medications to help him control himself and, even then, he would still have problems. Based on this testimony, his counsel was able to argue to the jury that three statutory mitigating circumstances were present, including that Mason had substantially-impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the law. The informant's statement that Mason was "out of control" is hardly prejudicial if the defense also argued that Mason could not control his behavior as a mitigating circumstance. Under all of the circumstances presented in this record, we conclude that Mason has failed to show "more than a reasonable possibility that the error contributed to the sentence." *Horsley*, 45 F.3d at 1493.

For the foregoing reasons, we find no reversible error in the conviction and sentence imposed here.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-12195-P

July 10, 2009

DERRICK O'NEAL MASON,

Petitioner-Appellant,

—versus—

RICHARD F. ALLEN, Commissioner,
Alabama Department of Corrections,

Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

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ORDER:

Petitioner Derrick O'Neal Mason seeks a certificate of appealability (COA) from this court on fifteen separate grounds. Applying the standards of 28 U.S.C. § 2253(c), *Miller-El v. Cockrell*, 537

U.S. 322 (2003), and *Slack v. McDaniel*, 529 U.S. 473 (2000), to Mason's Application for a Certificate of Appealability, we GRANT as to the following issues:

> (1) Whether Mason's Sixth Amendment right to confront witnesses against him was violated.
>
> (2) Whether Mason's arrest for assault was a pretext for police to interrogate him about the homicide.
>
> (3) Whether Mason's custodial statements about this crime were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).
>
> (4) Whether the search of Mason's car was unconstitutional.

As to all other issues, the application is DENIED.

/s/ ROSEMARY BARKETT
UNITED STATES CIRCUIT JUDGE

IN THE CIRCUIT COURT OF
MADISON COUNTY, ALABAMA

Case No. CC94-922LHL

STATE OF ALABAMA

—vs.—

DERRICK O'NEAL MASON

Comes the State of Alabama by its Assistant District Attorney, the Honorable Karen Elaine Hall, also comes the defendant, Derrick O'Neal Mason, in his own proper person and in the presence of his attorneys, the Honorable Jackie Ferguson and Randy Ferguson, and after being arraigned in open Court upon an indictment charging the offense of Capital Murder, to-wit: Murder During a Robbery in the first degree or an attempt thereof, for his plea thereto says that he is not guilty. Issue is joined.

Thereupon comes a jury of good and lawful men and women, to-wit: Jeffrey L. Zelickson, Foreperson, and eleven others, who, being duly empanelled, sworn and charged by the Court according

to law, before whom the trial of this cause was entered upon and continued from day to day and from time to time, said defendant, Derrick O'Neal Mason, and his attorneys being in open Court at each and every stage and during all of the proceedings in this cause, now on this the 16th day of June, 1995, said jurors upon their oaths do say: "We, the jury, find the Defendant, Derrick O'Neal Mason, guilty of capital murder as charged in the indictment. Jeffrey L. Zelickson, Foreperson".

Thereupon, the Court adjudges the defendant, Derrick O'Neal Mason, guilty of the capital offense of Murder During a Robbery in the first degree or an attempt thereof, and a jury sentence recommendation hearing being held before the same jury which convicted the defendant, and said jury being by the Court duly sworn, empanelled and charged according to law before whom an evidence hearing being conducted on aggravating and mitigating circumstances for a recommendation of sentence, and the defendant, Derrick O'Neal Mason, and his attorneys being present in open Court at each and every stage and during all of the proceedings in this cause, said jurors upon their oaths do say: "We, the jury, recommend that the Defendant, Derrick O'Neal Mason, be punished by death. The vote is as follows: 10 Votes For The Recommendation 2 Votes Against The Recommendation. Scott N. Howell, Foreperson".

Thereupon, in open Court, there being present the said defendant and his attorneys, the Court sets a sentencing hearing for a later date and time.

This the 16th day of June, 1995.

/s/ Loyd H. Little, Jr.
Loyd H. Little, Jr.
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF
MADISON COUNTY, ALABAMA

No. CC94-922LHL

August 14, 1995

STATE OF ALABAMA,

—v.—

DERRICK O'NEAL MASON,

Defendant.

SENTENCING ORDER

The Defendant was charged by indictment with the murder of Angela Michelle Cagle during a robbery in the first degree or an attempt thereof. The trial, including jury selection, occurred June 12 through June 16, 1995. A jury returned a verdict on June 16, 1995, finding the Defendant guilty of the capital offense, whereupon the Court adjudged the Defendant guilty in accordance with the jury's verdict.

On June 16, 1995, a separate sentencing hearing was conducted before the same jury. The jury returned a recommendation that the Defendant be punished by death. Ten (10) jurors voted in favor of the death penalty and two (2) jurors voted for the punishment to be life imprisonment without parole.

The Court had previously been furnished a written Presentence Investigation Report, which was prepared at the direction of the Court, on the Defendant's application to be arraigned as a Youthful Offender, which application was denied. The Court informed the parties of the existence of the Presentence Investigation Report and directed the attorneys for the State and for the Defendant to offer any additional information or corrections, as necessary, to the Presentence Investigation Report.

Pursuant to Section 13A-5-47(b), *Code of Alabama*, 1975, said Presentence Investigation Report was made a part of the record in this cause.

At the sentencing hearing before the Court, the State, through its District Attorney, asked the Court to fix the Defendant's punishment at death. The Defendant, through counsel, argued that the Court should fix the punishment at life imprisonment without parole.

FINDINGS OF FACTS SUMMARIZING THE CRIME AND THE DEFENDANT'S PARTICIPATION IN IT

Angela Michelle Cagle was twenty-five years old at the time of her death. She was married. She

was murdered during the late hours of March 26, or the early morning hours of March 27, 1994, while working the third shift (10:00 p.m.-6:00 a.m.) as a convenience store clerk in a convenience store in Huntsville, Madison County, Alabama.

Several days before Mrs. Cagle's murder, the Defendant Derrick O'Neal Mason, borrowed a Davis .380 pistol from a friend of his.

When the Defendant was arrested on March 29, 1994, this same pistol was found in the vehicle being operated by the Defendant. This pistol was delivered to the Department of Forensic Sciences for the State of Alabama and Mr. Brent Wheeler, a firearms expert, stated unequivocally, based on ballistic testing performed, that the weapon recovered from the Defendant was the weapon that discharged the bullets that were recovered at the crime scene, one of which caused the death of Angela Michelle Cagle.

On the night of Mrs. Cagle's death, the Defendant entered the convenience store where Mrs. Cagle was working, and demanded that she turn off the video recorder. There was no video recorder in this store. The Defendant then had Mrs. Cagle go into a back storage room. He tore at her blouse causing four of the buttons to break loose from the blouse, and those four buttons were found on the floor. The Defendant either ordered Mrs. Cagle to disrobe or he in some way assisted in her becoming disrobed. While clad only in her socks, Mrs. Cagle was sitting on the desk in the storage room at the time of her death.

The Defendant then shot Mrs. Cagle at close range in the left side of the face, which gunshot wound did not cause her immediate death, but

shattered the jaw bone and caused great pain and anguish. The victim then fell over on the desk on her left side. The Defendant told the investigators, that Mrs. Cagle moved and that he did not want there to be any witness. He then pointed the gun at the right side of her face and fired a second bullet which caused her immediate death.

Based upon the confession of the Defendant, which was testified to by Mr. Bud Parker of the Huntsville Police Department, and based upon the testimony of Dr. Joseph Embry, the Court can clearly conclude that the events leading to the death of Mrs. Cagle occurred as stated above. In particular, the Defendant told Mr. Bud Parker that after the first shot he saw the victim move, and that is when he fired the second shot.

The Defendant entered the store intending to rob the same, and did in fact attempt to rob the store, but was unsuccessful and then left the scene. Lisa Hamilton, another investigator for the Huntsville Police Department, as did other members of the Huntsville Police Department, found Mrs. Cagle's nude body at the scene, with her clothing on the floor under or near the edge of the desk on which her body was found.

Several witnesses testified that they heard a beeping sound from the cash register which indicated that someone had attempted to open the cash register without ringing up a sale, and the person had punched the wrong key on the cash register.

As stated above, Dr. Joseph Embry testified that the bullet entering the right cheek went into the brain and killed Mrs. Cagle instantly, and that the bullet that entered the left cheek would not

have killed her and would have been painful. Dr. Embry also testified as to abrasions or bruises he found on different parts of her body and which were new or recently inflicted. The two cuts on her face, as found by Dr. Embry, were, according to him, caused by the same instrument. The victim also had recent bruises on her upper and lower left arm and a recent bruise on her left buttock and an abrasion on her left shoulder.

There was no evidence that the victim had been raped or sexually molested, although John Kilbourn, with the Department of Forensic Sciences, testified that a pubic hair found in the pubic combings of the victim was a Negroid pubic hair, which was consistent with the sample pubic hair recovered from Mr. Mason pursuant to an Order of this Court. The victim was Caucasian.

The Defendant was taken into custody on March 29, 1994 and was later charged and indicted for the capital murder of Angela Michelle Cagle.

FINDINGS CONCERNING THE EXISTENCE OR NON-EXISTENCE OF AGGRAVATING CIRCUMSTANCES

Pursuant to Section 13A-5-47(d), *Code of Alabama*, 1975, which requires the trial court to enter specific findings concerning the existence or non-existence of each aggravating circumstance enumerated by statute, the Court finds that none of the aggravating circumstances enumerated by statute were proved beyond a reasonable doubt, except the following, which the Court does find were proven beyond a reasonable doubt:

(1) The capital offense was committed while the Defendant was engaged in the commission of a robbery in the first degree, or in an attempt thereof. The jury's verdict finding the Defendant guilty of capital murder, as charged in the indictment establishes the existence of this aggravating circumstance and the verdict is supported by the evidence. (Section 13A-5-50, *Code of Alabama*, 1975)

(2) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses. The Court reaches this conclusion based upon the following evidence:

(a) The victim, Mrs. Cagle, was alone, defenseless and of no physical threat to the Defendant.

(b) The Defendant caused or directed the victim to disrobe in his presence, obviously inflicting great fear and humiliation in the victim prior to her death. There is no logical explanation for this behavior on the part of the Defendant except his indifference and even enjoyment of the suffering of this victim.

(c) The victim was shot twice at close range as indicated by the expert testimony. The first shot did not kill the victim but caused great pain as a result of the shattering of the bone or bones in her face. The second shot was

fired into her face as she lay helpless and suffering from the first gun shot wound to the other side of her face.

(d) The Defendant planned this crime in advance, obtaining the gun used to kill the victim several days earlier and by parking his vehicle out of view and behind the store.

(e) The Defendant intended to kill the victim by shooting her the second time, realizing that she was still alive, so that there would be no witness to this crime.

(f) The most heinous, atrocious or cruel aspect of this crime was the execution styled killing of this victim. The court can conclude from the evidence presented, and from the confession of the Defendant, that he first made the victim go into the back storage room of the convenience store, which was not visible from the other parts of the store, or to anyone who might pass. He caused the victim to completely disrobe except for her socks, all of her clothing being found under or near the desk on which her body was found. He shot her at close range while she sat naked and completely vulnerable to the actions of the Defendant. Realizing that Mrs. Cagle was not dead because he saw her move, he inflicted the fatal gun shoot wound at close range into the right

side of her face. The Court concludes that the crime of this Defendant was extremely wicked, shockingly evil, outrageously wicked and vile and cruel, with the actions of the Defendant designed to inflict a high degree of pain and fear in the victim, with utter indifference to, or even enjoyment of, the suffering of this victim. Any murder of a defenseless victim is to some extent heinous, atrocious and cruel, but the degree of heinousness, atrociousness and cruelty, with which this offense was committed, exceeds that common to all capital offenses.

FINDINGS CONCERNING THE EXISTENCE OR NON-EXISTENCE OF MITIGATING CIRCUMSTANCES

In compliance with the statutory requirement that the trial court enter specific findings concerning the existence or non-existence of each mitigating circumstance enumerated by statute (Sections 13A-5-51 and 13A-5-52, *Code of Alabama*, 1975), the Court finds as follows:

(1) *The Defendant has no significant history of prior criminal activity.* The Presentence Investigation Report, which has not been challenged by the Defendant, or the State, shows the Defendant's prior criminal history to be as follows: as a juvenile he was convicted of Attempted Arson in the first degree, and Sexual Abuse in the first degree. Additionally, the

Defendant had a conviction for Speeding, Failure To Yield, Improper Passing, Violation of Probation, and Assault in the third degree. This Court cannot conclude that the Defendant has a significant history of prior criminal activity and considers this to be a mitigating circumstance in this case.

(2) *The capital offense was committed while the Defendant was under the influence of extreme mental or emotional disturbance.* Prior to the trial, the Defendant requested and was granted by the District Court, a psychiatric examination which was performed by Dr. Lawrence R. Maier, on October 6, 1994. Dr. Maier's written report was made a part of the record in this cause. Dr. Maier found the Defendant competent to stand trial. Concerning the Defendant's mental state at the time of the crime, Dr. Maier determined that the Defendant was "apparently highly intoxicated, although not without the ability to distinguish right from wrong". Dr. Maier concluded that there was not sufficient evidence to warrant a mental state defense, and the Defendant was returned to Court to face the capital murder charge. The Defendant told the investigating officers that he was "high" during the time that he committed this offense. At the sentencing phase before the jury, the Defendant testified that he recalled killing Mrs. Cagle, but then stated on cross examination that he did not remember or recall the details of his crime. He stated that he understood what he did and thinks of it

every day. Even though there was evidence of prior drug use by this Defendant, and drug use on the date of this crime, all of which has been considered by the Court, there is no evidence that Derrick O'Neal Mason was under the influence of drugs and/or alcohol to the extent that it prevented him from appreciating the criminality of his conduct. Therefore, the court finds that the evidence presented on this subject is not sufficient for this Court to find that this is a mitigating circumstance.

(3) With respect to mitigating circumstances numbered (3), (4), and (5) in Section 13A-5-51, there is no evidence nor contention that these mitigating circumstances exist in this case.

(4) *The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.* The Court adopts the findings stated in Paragraph (2) immediately above concerning "the influence of extreme mental or emotional disturbance". Additionally, the Court finds from the evidence that the method employed by the Defendant in the planning and committing of this crime negate the contention that the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The use of alcohol or drugs may have given the Defendant the tenacity to commit this crime, but there is no evidence to support the contention that this mitigating circumstance, Section 13A5-51 (6), exists.

(5) *The age of the Defendant at the time of the crime.* The Defendant was nineteen (19) years old at the time he committed this crime. The Court determines that this is a mitigating circumstance in this case.

(6) The court has also considered the aspects of the Defendant's character and record, and any of the circumstances of the offense that the Defendant has offered in mitigation. Specifically, the Court has considered the family background of the Defendant, the apparent troubles that he had in the public schools of this county, the fact that he was diagnosed at an early age with Attention Deficit Disorder, and that he cooperated with the investigators following his arrest. The Court has also considered the numerous letters addressed to this Court by friends or acquaintances of the Defendant or of his family, most of which have requested that this Court impose a sentence of life without parole.

CONCLUSION

As required by statute, this Court has carefully weighed the aggravating and mitigating circumstances which it finds to exist in this case, and has diligently searched the record for other mitigating circumstances. The Court has also taken into consideration the fact that ten (10) members of the jury recommended that the Defendant be punished by death.

It is the judgment of this Court that the aggravating circumstances of this offense clearly outweigh any mitigating circumstances.

Prior to sentencing, the Defendant was given an opportunity to say anything individually or through his attorneys as to why sentence should not be pronounced.

Accordingly, it is ORDERED, ADJUDGED and DECREED by the Court that the Defendant, Derrick O'Neal Mason, be punished by death.

Rule 8(d)(1), Alabama Rules of Appellant Procedure, provide that the Supreme Court shall at the appropriate time enter an order fixing a date of execution.

The Defendant, Derrick O'Neal Mason, shall be committed to the custody of the Warden of the William C. Holman Unit of the Alabama State Prison System at Atmore, Alabama, to await appropriate orders from the Supreme Court of the State of Alabama upon disposition of the appeal or other review of Defendant's conviction and of this sentence. The Order of the Alabama Supreme Court fixing the execution date shall constitute the execution warrant.

Pursuant to the provisions of Section 12-22-150, *Code of Alabama*, 1975, the Court hereby enters on the record that the Defendant appeals from said judgment of conviction and the sentence imposed. Execution of this sentence shall be stayed pending said appeal.

The Defendant was represented by retained counsel in this case, Jackie D. Ferguson and Randy W. Ferguson. The Defendant, at the time sentence was pronounced, was advised of his right to an appointed attorney in the event that he was

unable to afford an attorney, and he was further advised of his rights to a free transcript for appeal purposes, if he was unable to pay for the same. The Defendant and his attorneys were further advised that in the event that the Defendant desired the services of an appointed attorney for appeal purposes or a free transcript, that he was to notify this Court and that the same would be ordered.

DONE this 14th day of August, 1995.

/S/ LOYD H. LITTLE, JR
LOYD H. LITTLE, JR.
Circuit Judge

COURT OF CRIMINAL APPEALS OF ALABAMA

No. CR-94-2143

March 6, 1998

Rehearing Denied May 8, 1998

DERRICK O'NEAL MASON

—v.—

STATE

Bruce Gardner, Huntsville, *for appellant.*

Bill Pryor, atty. gen., and Michael Billingsley, asst. atty. gen., *for appellee.*

BROWN, Judge.

The appellant, Derrick O'Neal Mason, was convicted of the capital offense of murder committed during the course of a robbery in the first degree or an attempt thereof, a violation of § 13A-5-40(a)(2), Code of Alabama 1975. By a vote of 10 to 2, the jury recommended that the appellant be sentenced to death. The trial court followed the jury's recommendation and sentenced the appellant to death.

At the time of her death, 25-year-old Angela Cagle was working as a clerk in a Majik Mart convenience store in Huntsville. Around 2:30 a.m. on Sunday, March 27, 1994, Don Teal, a newspaper delivery man, entered the south door of the Majik Mart to deliver a stack of newspapers. He spoke briefly with Angela Cagle and a customer who was in the store.

Around 3:30 a.m., DeAnna Lechman stopped by a nearby Circle K convenience store to purchase some cigarettes. Circle K did not have the brand that Lechman wanted, so she went to the Majik Mart. Lechman entered through the north door of the store because the south door was locked. As she entered the store, she noticed a sign on the door that read, "This door locked. Use other door." (R. 825.) Lechman did not see anyone in the store, so she assumed that the clerk was in the back. She called out for the clerk. When Lechman approached the back of the store, she observed the partially nude body of Angela Cagle, lying in the storeroom.

Lechman went to the counter and telephoned for help. While she was talking with the police dispatcher, she noticed that the "gas pump machine"

was beeping and that it reflected an amount of $5.00 in the display. The cash register was also emitting a continuous tone. In order to hear the dispatcher, Lechman turned off the gas pump machine. She tried unsuccessfully to turn off the cash register.

Within a few minutes, the police arrived at the scene. Paul Hatfield, a patrol officer with the Huntsville Police Department, was one of the first officers to arrive. When Hatfield entered the storeroom, he found the partially nude body of Angela Cagle—she was wearing only her socks—lying across a desk. Cagle was lying on her left side, and she appeared to have suffered a gunshot wound to the right side of her face. Cagle had no visible signs of life.

Cagle's clothing was found near the desk. A bullet was recovered from the west wall in the area above Cagle's hips. A second bullet was found on some shelves located directly north of the victim's head. A shell casing was discovered in the bookshelves, and another casing was found on the floor in the area near Cagle's body. When the coroner removed Cagle's body, a second bullet wound was found on the victim's left cheek. Black buttons were found in the area near Cagle's body. Another button was later found stuck to the victim's chest. A negroid pubic hair, consistent with a known pubic hair from the appellant, was found in the combings from Cagle's pubic hair. In addition, cloth fibers that did not match Cagle's clothing were found on her left inner thigh and calf.

Susan Marcum, who was at that time the manager of the Majik Mart, had spoken with Angela Cagle several times by telephone that night, the

last time being around 2:00 a.m. Marcum was summoned to the store around 4:00 a.m. She was able to determine that the last sale occurred at 2:58 a.m., and that no money was missing from the store and that no gasoline had been stolen. Marcum testified that the only way to make the cash register emit the tone heard at the scene was to hit an incorrect button on the register.

Harry Renfroe, Jr., a homicide investigator with the Huntsville Police Department, assisted in the investigation. On March 28, 1994, he was contacted by Dewey Miller, the police officer who was securing the crime scene. Miller informed Renfroe that a black male had approached him at the scene and had asked what type of gun was involved in the incident. Miller told the individual that he did not know. The individual told Miller where he could be reached. Miller conveyed this information to Renfroe. When Renfroe telephoned the individual, the man asked Renfroe what type of weapon was used in the incident. Renfroe asked the individual what type of weapon he was interested in and the man replied a ".380." (R. 1154.) The individual declined to meet with Renfroe that day. When the man telephoned Renfroe the next day, Renfroe asked him what type of .380 had been used in the shooting. The individual indicated that he was not sure. At that time, Renfroe was aware that forensic tests performed on the bullets recovered from the scene indicated that the weapon used was most likely a Davis .380. The man subsequently telephoned Renfroe and told him that the weapon was a Davis .380.

Renfroe agreed to meet with the individual at a local fast-food restaurant that afternoon. During

their meeting, the man gave Renfroe the appellant's name. When Renfroe asked the individual why he thought the appellant was involved, the individual replied that the appellant had a .380 pistol and that the appellant was trying to make a name for himself. He told Renfroe that the appellant "was out of control." (R. 1157.) Renfroe returned to his office and informed the other investigators of the information that he had received. The investigators were able to obtain a physical description of the appellant, his address, and a description of his vehicle.[1] Renfroe subsequently spoke with the individual who had furnished him the appellant's name, and the man said that the appellant would most likely be at a certain apartment complex that afternoon or later that evening. A "be-on-the-lookout" was issued for the appellant.

That night, James Goings, a member of the Huntsville Police Department special response team, and another officer spotted the appellant's vehicle. Goings stopped the appellant's vehicle after it entered the drive-through lane of a fast-food restaurant. Two officers in another vehicle followed Goings's vehicle into the parking lot. The appellant cooperated with the officers when he was ordered out of the vehicle and placed under arrest. The appellant was subsequently transported to the criminal investigation division of the police department (CID).

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[1] Testimony elicited in the suppression hearing indicated that the officers discovered that there was an outstanding warrant for the appellant's arrest for third-degree assault. This information was not provided to the jury

Lisa Hamilton, an evidence technician with the Huntsville Police Department, assisted by Officer Dwight Hasty, performed an inventory search of the appellant's vehicle. A Davis .380 pistol, which was wrapped in a shirt, and a clip containing five rounds of ammunition were found in the appellant's vehicle.

That night, Hamilton transported the weapon and the clip to Brent Wheeler, a firearms expert with the Alabama Department of Forensic Sciences. Ballistics tests indicated that the bullets found at the crime scene had been fired through the weapon recovered from the appellant's vehicle.

Harry Renfroe, one of the investigators, first spoke with the appellant when the appellant was brought into the interview room at CID on the night of March 29, 1994. After being apprised of his rights, the appellant waived his rights and talked with Renfroe. In response to Renfroe's questions, the appellant admitted that he had a Davis .380 weapon in his truck. He told Renfroe that he had borrowed the weapon the previous Thursday from an individual named "Barrington." The appellant told Renfroe that the gun had not been out of his possession since that time, and that it had been fired twice. When Renfroe inquired about the appellant's whereabouts on the night of the murder, the appellant told him that he had fallen asleep on the couch at his girlfriend's apartment, while watching television. During the course of the interview, Renfroe was informed that ballistics tests indicated that the gun found in the appellant's truck was the murder weapon. When Renfroe confronted the appellant with this fact, the appellant continued to deny any

involvement in the murder. Renfroe left the interview room.

The appellant subsequently asked everyone but James (Bud) Parker, an investigator with the Huntsville Police Department, to leave the room, and then he confessed to Parker that he killed Angela Cagle. Parker testified as follows regarding the statement:

> "I identified myself, and at 016 hours on 3/30/94 I advised him of his rights. He said he understood and would tell me what happened.
>
> "I first asked him if his name was Derrick O'Neal Mason, date of birth 8/9/74. He said, 'Yes, sir.' I asked him if he shot the victim. He said, 'Yes sir.' I asked him why he went into the store. And he said, 'To rob it.' I asked him why he shot the victim. He said, 'I just did it. It just happened.' I asked him what time he went into the store. He said, 'It was late.'
>
> "During the course of the interview the suspect stated he went in the door on the side near the Circle K, which would have been the south door. The victim was from behind-from behind the counter working on a shelf with the merchandise. He had the gun out and was trying to cover his face with his arm. He told her to lock the door, which she did. And she took the key over to the other door and left it in the key hole. He told her to unlock the cash register and to give him the money. She said she could not until the next transaction. He told her to go to the back and to unplug the camera. She went to the back and he went behind her. He kept telling her to unplug the

camera, and she said there was no camera in the store. He then said, 'I did not want to go back out front with the camera on.' He said, 'She kept saying there was no camera in the store.' He did not believe her because he thought all stores had cameras. He told her, 'If you don't unplug the camera, I will be forced to shoot you,' he said. 'I had put a bullet in the chamber earlier and was just going to shoot.' He said, 'I had the safety on.' I asked him if the clip was in the gun, and he said, 'Yes.' I asked him if it was loaded, and he said, 'Yes.' He then said, 'I thought I was going to get carjacked earlier.' He then said, 'I kept telling her to unplug the camera, and she kept saying they did not have a camera, and I did not believe her.' She said, 'Let me go get you the money,' and I thought she was going to push some button. The victim started walking and he grabbed her by the shoulder and her jacket and shirt ripped. He heard the buttons fly off.

"He then said, 'I saw her private area.' He said, 'She was crying and I got real nervous.' He then told her, 'If you don't unplug the camera, I will make you take all your clothes off.' He looked outside to see if any car had stopped for gas. He told her to take all her clothes off, which she did. He told her, 'Now unplug the camera and show me how to open the cash register.'

"He then said, 'I was high.' I asked him what he was on. He said, 'Marijuana.' He then said he heard what he thought was a car. He

said, 'She was sort of standing in the floor in front of the desk and she came at me.' He again said, 'I was high and the gun went off and I shot her.' He said, 'It scared me. . . .' He then said, 'I looked and saw her leg move and I did not want her to identify me.' He said, 'I turned my head and put the gun down there and shot her the second time.'

"I asked him how far away he was when he shot her, and he said, 'About from me to you,' which was three to four feet. I asked him if he aimed the gun for her face, and he said, 'I just saw her shoulder. I thought I shot her in the chest.' I asked him why he shot her the second time, and he said, 'I did not want her to identify me; I just did it.'

"I then asked him where he went after the shooting. He said, 'I went up the street to the Executive Lodge and parked for about 10 minutes and tried to think, to cope with what I had done.' I asked him what he took out of the store, and he said, 'Nothing.' I asked him which door he went out as he was leaving the store. He said, 'The other door,' which would have been the north door. I then asked him if he raped the victim, and he said, 'No.' I asked him if he touched her in any way with his hands. He said, 'Nothing sexually.' I asked him where he went when he left the Executive Lodge Apartments, and he said, 'I went home and then went to my girlfriend's.'

"I asked him if his girlfriend knew what happened, and he said, 'No.' I asked him if anyone knew, and he said, 'I tried to tell my

brother to get it off my chest, but I did not.' I asked him who owned the gun, and he said, 'Barrington.' I asked him if anyone else was with him, and he said, 'No.' I asked him how long he stayed in the store, and he said, 'About 10 minutes.'

"I then asked him why he did that. He said, 'I was robbing the store to get the money to open a barber shop.' I then asked him how he was dressed that night. He said, 'The jeans and shoes that I have on and a purple shirt, which is at my girlfriend's house.' I then asked him if he knew the victim. He said, 'I have never seen her before.' I then asked him if she was sitting up on the desk when the first shot was fired, and he said, 'Her feet-her feet [were] on the floor,' and he thought she was going to come at him. He said he shot and thought he hit her in the chest. He then said, 'Fuck, if she lives, that will be a witness. I held the gun over her and pulled the trigger, turning my head.'

"I asked him what he was driving that night, and he said his mother's blue Oldsmobile and had it parked at Warren House Apartments and had walked to the store. I then asked him if he pumped some gas in his car before he shot the victim, and he then said, 'I did get $2 in gas about 30 minutes before it happened.' I asked him if he got it at that store, and he said, 'Yes. I just rode around.' I then told him to tell me the truth and asked if he pumped $5 in gas from the north pump, and he said, 'No.'

"I then asked him how he knew the victim was by herself. He said, 'I parked at Warren House behind the Circle K, I walked down the hill behind the store, I looked inside from up on the hill, I then went back and got my car and pulled out on Sparkman and turned into the parking lot on the north side of the building.' I again asked if he parked at the gas pumps, and he said, 'No, I parked at the door which was locked.' I asked him if he had anything else he wanted to tell me, and he said, 'No, I can't think of anything else.'

". . . .

". . . I then told him there was one other thing I needed to know, and I asked him if he tried to open the cash register. And he said, 'Yes, I pushed some buttons and it started beeping and I went out the door.' "

(R. 1250-56.)

Barrington Loyd Dames, a student at Oakwood College at the time of the murder, testified that he was an acquaintance of the appellant's. Dames loaned the Davis .380 pistol to the appellant on two occasions. He first loaned the appellant the gun approximately a week and a half before the murder. The appellant returned the gun to Dames two days later. Dames again loaned the appellant the pistol on the Thursday before Angela Cagle was murdered. Dames saw the appellant approximately two days after Cagle was murdered. The appellant told Dames that he still had the gun. The appellant did not return the gun to Dames.

Dr. Joseph Embry, a forensic pathologist for the Alabama Department of Forensic Sciences, performed the autopsy on Angela Cagle. He testified that the victim had several bruises on her body. Embry testified that the bruises to Cagle's left thigh, right knee, left arm, and buttocks appeared to be recent. Embry testified that Cagle had two *bruises on her head*, which appeared to have been inflicted by the same instrument. Dr. Embry testified that the victim had suffered two gunshot wounds to her head. The gunshot wound to the right side of Cagle's head passed through her brain stem, killing her instantly.

I.

The appellant contends that comments made by the prosecution during closing arguments at the guilt phase of the trial mandate reversal of his conviction. Specifically, he claims that portions of the prosecution's closing arguments "included improper vouching regarding the credibility of the State's witnesses, statements of facts not supported by the record, improper statements of personal opinions regarding the evidence, misstatements of the law, and misstatements of the role of the jury and the function of a prosecutor in a criminal trial." (Appellant's brief, p 13.) [2]

The appellant concedes that he did not object to any of the allegedly improper comments; however, because this is a case in which the death penalty

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[2] The state was represented at trial by the district attorney and an assistant district attorney. The assistant district attorney argued first for the state in closing, and the district attorney argued in rebuttal

has been imposed, this Court must review the comments for plain error.

> "In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."

Rule 45A, Ala.R.App.P.

> "In considering what constitutes plain error in a capital case, we have adhered to the interpretation of the term 'plain error' adopted by the Alabama Supreme Court, which follows the interpretation given that term by the federal courts. See *Ex parte Harrell,* 470 So.2d 1309 (Ala.), cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985); *Ex parte Womack,* 435 So.2d 766 (Ala.), cert. denied, 464 U.S. 986, 104 S.Ct. 436, 78 L.Ed.2d 367 (1983). See also *Hooks v. State,* 534 So.2d 329 (Ala.Cr.App.1987), aff'd, 534 So.2d 371 (Ala.1988), cert. denied, 488 U.S. 1050, 109 S.Ct. 883, 102 L.Ed.2d 1005 (1989). Plain error is error that has or probably has adversely affected a substantial right of the appellant, Ala.R.App.P. 45A, or is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings. *Ex parte Womack.* The failure to object at trial weighs against any claim of prejudice an appellant may make. *Kuenzel v.*

State, 577 So.2d 474 (Ala.Cr.App.1990), aff'd, 577 So.2d 531 (Ala.1991)."

Bush v. State, 695 So.2d 70, 87 (Ala.Cr.App.1995), aff'd, 695 So.2d 138 (Ala.1997). See, also, *Davis v. State*, 718 So.2d 1148, 1154 n. 3 (Ala.Crim. App.1997).

In evaluating the propriety of prosecutorial arguments, this Court has stated:

> "'"This court has concluded that the failure to object to improper prosecutorial arguments . . . should be weighed as part of our evaluation of the claim on the merits because of its suggestion that the defense did not consider the comments in question to be particularly harmful." *Johnson v. Wainwright*, 778 F.2d 623, 629 n. 6 (11th Cir.1985), cert. denied, 484 U.S. 872, 108 S.Ct. 201, 98 L.Ed.2d 152 (1987).'
>
> "*Kuenzel v. State*, 577 So.2d 474, 489 (Ala.Cr.App.1990), aff'd, 577 So.2d 531 (Ala.), cert. denied, 502 U.S. 886, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991).
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> ". . . .
>
> "As the United States Supreme Court stated in *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986):
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> "'[I]t "is not enough that the prosecutors' remarks were undesirable or even universally condemned." The relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to

make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).'

"(Citation omitted.)

"We must evaluate the comment in the context of the entire proceedings.

"'"Whatever is in evidence is considered subject to legitimate comment by counsel." *Bankhead v. State,* 585 So.2d 97 (Ala.Cr.App.1989), aff'd, 585 So.2d 112 (Ala.1991). See also *Ward v. State,* 440 So.2d 1227 (Ala.Cr.App.1983). "The prosecutor has the right to present his impressions from the evidence. He may argue every matter of legitimate inference and may examine, collate, sift, and treat the evidence in his own way." . . . *Donahoo v. State,* 505 So.2d 1067, 1072 (Ala.Cr.App.1986).'

"*Williams [v. State],* 601 So.2d [1062,] at 1072-73 [(Ala.Cr.App.1991)]. '"[C]ounsel in the trial of any lawsuit has the unbridled right (to be sure, duty) to argue the reasonable inferences from the evidence most favorable to his client." ' *Kuenzel,* 577 So.2d at 492, quoting *Ex parte Ainsworth,* 501 So.2d 1269, 1270 (Ala.1986). (Footnote omitted.) . . . '"Counsel for the state and defendant are allowed a rather wide latitude in drawing their deductions from the evidence.' " *Kuenzel,* 577 So.2d at 493, quoting *Arant v. State,* 232 Ala. 275, 279, 167 So. 540, 543 (1936)."

Burton v. State, 651 So.2d 641, 651-52 (Ala.Cr.App.1993), aff'd, 651 So.2d 659 (Ala.1994), cert. denied, 514 U.S. 1115, 115 S.Ct. 1973, 131 L.Ed.2d 862 (1995).

A.

The appellant contends that the assistant district attorney improperly argued facts not in evidence. Specifically, he maintains that the assistant district attorney's closing argument "included numerous references to her own personal opinions about the evidence." (Appellant's brief, p. 13.) In support of his contention, he refers us to several portions of the closing argument where the assistant district attorney prefaced her remarks with the phrase, "I believe," or some other similar expression. The appellant argues that "[a]rguments regarding the prosecutor's personal beliefs are always improper, because the 'beliefs' are based on non-record information." (Appellant's brief, p. 13.) In a related argument, he maintains that the prosecutor inappropriately "argued to the jury that in her opinion [the appellant] tried to rape Ms. Cagle," a statement that he claims is not supported by any evidence. (Appellant's brief, p. 13.)

We have carefully reviewed the assistant district attorney's closing argument and find that, contrary to the appellant's assertion, the prosecutor did not improperly argue matters not in evidence. In each instance cited by the appellant, the prosecutor was legitimately commenting on the evidence and was drawing reasonable inferences from that evidence. *Burton,* supra. The fact that the prosecutor prefaced some comments with "I

believe" or "I think," or some other similar expression, does not render the comments improper.

> "In *Ex parte Rieber,* 663 So.2d 999 (Ala.1995), *cert. denied,* 516 U.S. 995, 116 S.Ct. 531, 133 L.Ed.2d 437 (1995), the Alabama Supreme Court stated:
>
> > "'Furthermore, we view those comments that the prosecutor prefaced with "I think," "I believe," "I feel," "I am satisfied," and "I have no doubt," as expressing his reasonable impressions from the evidence. . . . We note, however, that even if these comments were to be viewed as expressions of the prosecutor's personal opinions and, thus, as "crossing the line" as permissible argument, they nonetheless, would not constitute reversible error.'
> >
> > "*See also, Boyd v. State,* 715 So.2d 825 (Ala. Cr.App.1997)."

Roberts v. State, 735 So.2d 1244 (Ala.Cr.App. 1997).

We find no error in the portion of the prosecutor's argument where she stated that the appellant might have tried to rape the victim. The prosecutor argued:

> "Do I think he raped her? I don't know. But what I do think is that he at least tried. There is no other explanation for having this woman be so completely humiliated with all of her clothes off. There is no other explanation for the pubic hair consistent with hers in his [sic]. There is, to me, some indication that it

> occurred by virtue of the fact that here on her upper left leg was a bruise, that on this left leg were found some fibers of clothing not consistent with his [sic]. I will always believe that as she sat there on that desk trying to protect her virtue, he tried to pry her legs apart, perhaps with his elbow, causing this bruise, rubbed up against her perhaps causing the fibers on her left leg, and that as he tried to make entry he left that pubic hair in hers."

(R. 1347-1348.) When the victim was found, she was wearing only her socks, she had a fresh bruise on her inner thigh, and a negroid pubic hair consistent with the appellant's was found in her pubic hair. In addition, material fibers not consistent with her clothing were found on her inner thigh. Testimony established that the fibers could have been deposited on the victim by someone rubbing against her. There was evidence that the victim's shirt had been forcibly removed from her body. Furthermore, the appellant admitted to the police that he forced the victim to remove the rest of her clothes. Accordingly, we conclude that the prosecution's argument is a legitimate inference from the evidence presented.

B.

The appellant also argues that the assistant district attorney inappropriately "argued to the jury that they must take the information provided by the confidential informant 'as a matter of law,' a comment that, he claims, "is a clear misstatement of the law, and was calculated to mislead the jury." (Appellant's brief, p. 14.)

During her closing argument, the assistant district attorney argued:

> "In his opening, [defense counsel] stated a number of things, the most glaring of which I believe to be incorrect, was that the confidential informant was told by the uniformed officer there at the scene what type of weapon was used. I think it's important that I cover that with you. I don't necessarily believe this, but studies show that some jurors-or most jurors make up their mind about a case, I think they said 82% of all jurors make up their minds after the opening statements, and they are not supposed to do that. And I hope that you have not done that. Because part of what was said by [defense counsel] was glaringly incorrect. And I hope that as he comes before you in his closing argument, he will admit that the statements he made about the confidential informant were in fact, and are in fact, incorrect.
>
> "Investigator Renfroe told you that Officer Miller did not tell this suspect [sic] what type of weapon they were looking for, that Officer Miller did not know the caliber of the weapon they were looking for. And Officer Miller would have testified, but by agreement we didn't bring him in and put him on the stand; we allowed him to testify as to what Officer Miller would say. There is no dispute about that. And I think [defense counsel] will acknowledge that-that Officer Miller did not know what type of weapon was used and he did not tell this informant.

"Now, as a matter of law, information provided by a confidential informant is admissible, and, if proven to be reliable, which it was in this case, then the identity and certain other legal things must happen, but because you were allowed to receive that confidential informant's information, it was in fact admissible, and because it was admissible and because it had been discussed by the parties and with the Judge and the law had been reviewed, the identity of this informant did not-does not and will not ever have to be revealed.

"Investigator Renfroe told you that when he was approached by this young man, he did so on the condition of anonymity, he wanted to remain confidential. Investigator Renfroe told you from the stand that to this day his identity remains confidential. It's known to the parties that need to know, but to the finders of the fact, *you must simply take, because it has been held admissible, the information that the confidential informant provided, as a matter of law.*

"This confidential informant, who is obviously known to the defendant, perhaps even a close friend of this defendant, said that he came to Investigator Renfroe because this young man, Derrick Mason, was out of control and wanting to make a name for himself on the streets."

(R. 1340-42.) (Emphasis added to highlight the portion the appellant finds objectionable.)

The allegedly inappropriate comment cannot be viewed in isolation, but rather should be viewed in the context in which it occurred. From our review of the record, it appears that the prosecutor's comments were directed toward statements made by defense counsel in opening arguments-in an apparent attempt to discredit the informant-that implied that the informant had learned from a police officer at the crime scene what type of weapon was involved. In her closing argument, the prosecutor reminded the jury that Investigator Renfroe testified that neither he nor Officer Miller had told the informant what type of weapon was involved. The prosecutor then told the jury why Officer Miller was not called to testify. The comment the appellant finds objectionable occurred as the prosecutor was explaining to the jury why the confidential informant had not been called to testify at trial.

When the allegedly objectionable comment is viewed in the context of the entire closing argument, it is apparent that the prosecutor was not telling the jurors that as a matter of law they had to believe the truth of what the informant said; rather, the prosecutor was explaining to the jury that as a matter of law the state was not required to reveal the identity of the informant. While perhaps the prosecutor's argument could have been clearer, we do not think the comment "'so infected the trial with unfairness as to make the resulting conviction a denial of due process'" *Burton*, 651 So.2d at 651, quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), especially in light of the fact that the trial court thoroughly instructed the jury that the tes-

timony regarding what the informant said was not offered to prove the truth of what the informant is alleged to have said, but rather, it was offered to explain the sequence of events that followed from the officer's conversation with the informant. (See Part V of this opinion for a more detailed discussion regarding the admissibility of the information conveyed by the informant.) Finally, we note that the jury was cautioned many times that statements made by the attorneys were not evidence. Accordingly, the prosecutor's comment does not rise to the level of plain error.

C.

The appellant contends that the district attorney "made numerous impermissible comments to the jury." (Appellant's brief, p. 14.) Specifically, he maintains that the district attorney improperly stated to the jury that there are "limitations imposed on the State in criminal trials regarding the type of testimony that is admissible." He claims this comment "clearly invited the jury to speculate about non-record information." (Appellant's brief, p. 14.) He also alleges that the district attorney improperly argued that he represented the accused. In support of his contentions, he refers this court to the following portion of the district attorney's closing argument in rebuttal:

> "As I said earlier in this case, I'm not the State of Alabama. . . . The State of Alabama is everyone in this courtroom, everyone who is a citizen of this community, of this county, and of this state, we are the State of Alabama. I

represent you in this trial, that's my job. That's Ms. Hall's job.

"Mr. Ferguson and Ms. Ferguson represent the defendant. They were retained by he or his family to represent him, and it's their job to come in here and give him the best representation that they can.

"Now, the reason I bring this up is that because I represent the State of Alabama and this defendant is a part of or a citizen of this community, Ms. Hall and myself in some way also represent him. And because of that fact, the law says and the rules that have been developed over the years by our Supreme Court and our legislature, dictate . . . what we can and cannot do in a criminal trial. And I know—or I suspect—I don't know, but I suspect that at some point during your deliberations, one or more of you will say to another one, 'Well, why didn't the State do this?' or 'Why didn't the State, the State's Attorney, say this? Why didn't they ask that witness this particular question? Why didn't they elicit this particular response to that question? Why didn't they produce into evidence and give us to examine a particular piece of evidence?' Well, if that question arises or any of those questions arise, that is your answer. We are limited by the rules of evidence, the rules of this court, and the laws of the State of Alabama. Because we function or serve a dual function and part of that being we, in some way, represent the defendant. So we have to be sure, as best we can, that this defendant

> gets a fair and impartial trial. So if any of you, during your deliberations, happen—that question comes up, 'Why didn't the State do this? Why didn't he say this? Why didn't she say that?' that may be the answer for your question. Please keep that in mind, we do have these rules. Ms. Hall and I have no quarrel with those rules. I have been doing this some twenty-odd years, and people before me a couple of hundred years, have been operating under these same rules. So we don't have any quarrel with them. They are good rules, they make our system work. But I wanted you to understand that the State, the prosecutor, is limited because of this dual role, this dual function and because of these rules that are made to make sure that a person charged with a crime gets a fair trial."

(R. 1399-1402.)

When the comments are examined in context, it is clear that the district attorney was explaining to the jury that while his function was to represent the State of Alabama, he also had an obligation to ensure that the appellant received a fair trial, and in fulfilling that obligation, he was bound by evidentiary rules. The district attorney was not inviting the jury to speculate about non-record evidence. On the contrary, the district attorney was cautioning the jury that it should not speculate about matters that were not in evidence. We find no plain error in the district attorney's remarks.

D.

The appellant alleges that the district attorney improperly argued "that the police obtained fingerprints in 'one out of 20 or 25 cases.' " He maintains that "[t]here was no testimony regarding these statistics, and to argue them to the jury was improper." (Appellant's brief, p. 14.)

During defense counsel's closing argument, counsel argued that the appellant's fingerprints were not found at the scene—a matter that the state stipulated to during the testimony of the trace evidence technician.

During rebuttal closing arguments, the district attorney argued:

> "All right. Let's talk just a minute about some of the other, what we call trace evidence, that was found at the scene. Lisa Hamilton is an experienced crime scene investigator. She collected all the evidence that she thought was relevant to this case. She checked for fingerprints. They lifted a number of what we call latent fingerprints, none of which turned out to be of any value. That means they couldn't be identified, or the ones that could were not identified as belonging to this defendant. But the ones that could were not identified as belonging to anybody else, either. So we don't know.
>
> "I submit to you that as she said, fingerprints are the kind of things that we prosecutors love to have but we very seldom get, contrary to what you see in the movies and on T.V. It's just one of those things, that if we—maybe one out of 20 or 25 cases we will

> have a fingerprint that can be identified. You can imagine in a convenience store all the surfaces from which you would expect to get somebody's fingerprints, like the door handles, the cash register, the counter around the cash register, and that sort of thing. How many people touch those things in a day's time or a week's time or month's time, between when they are cleaned and the next time? And it's just—you know, I put my fingerprints on a piece of glass. You come along behind it, you put yours on top of it, and neither of ours are going to be susceptible to identification. And that's just a fact of life. It's one I wish we had better technology and I wish we had fingerprints in every case, but we don't. But we always look for them. We keep trying. And once in a while we are rewarded with some. And there are a lot of reasons you don't find fingerprints, but those are some of the common ones."

(R. 1430-1431.)

The prosecutor's argument was directed toward defense counsel's intimation that the state's evidence was insufficient because the appellant's fingerprints were not found at the scene. Counsel has the right to respond to arguments by opposing counsel. *Chandler v. State*, 615 So.2d 100, 110 (Ala.Cr.App.1992), cert. denied, 615 So.2d 111 (Ala.1993) (Ingram, J., dissenting). Although the specific number of times that fingerprints are successfully recovered was not in evidence, we do not find that the prosecutor's comment regarding that statistical figure "'so infected the trial with unfairness as to make the resulting conviction a

denial of due process.'" *Burton*, 651 So.2d at 651, quoting *Donnelly*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431. Furthermore, as previously noted, the jury was cautioned numerous times that comments by counsel are not evidence. Accordingly, the prosecutor's comment does not rise to the level of plain error.

E.

The appellant again suggests that a comment made by the district attorney during his rebuttal closing argument inappropriately "invited the jury to speculate on evidence not admitted in the trial." (Appellant's brief, p. 15.) Specifically, he argues that the district attorney committed reversible error when he told the jury that the trial court had sustained defense counsel's objection to the admission of fibers into evidence and then stated, "'so you don't have them.'" (Appellant's brief, p. 14-15.)

The district attorney argued, in pertinent part:

> "What about these hairs and everything that was collected at the scene? [Defense counsel] made some issue about why the Caucasian hairs were not compared to someone else. Well, I submit to you that in this case, very soon after this crime was committed, Huntsville Police Department had developed a suspect, and very shortly thereafter, within a couple of days, as I recall, he was arrested and made a statement that is contained in [Investigator] Bud Parker's report, which effectively eliminated anyone else as a suspect in this case. So the detectives who handled

this case, I'm sure—and I haven't asked them this—didn't see the need to go on and search further for a suspect. We have got a guy who has confessed.

"Besides that, as I recall, none of these hairs were compared to any known head hair, pubic hair, body hair, or otherwise, until sometime this year, which is about a year after the crime was committed. So during that period of time we have had all of those hairs, fibers—*the fibers, by the way, that were recovered from the body, we offered and defense objected, as they have a right to do, and the Judge ruled that they are not admissible and they are not in, so you don't have them.* But if we had found any other trace evidence that had any bearing on this case, either pointing towards the defendant's guilt or his innocence, we would have brought them to you.

"As a matter of fact, the law requires us to let the other side know everything that we have, and we did in this case."

(R. 1431-1433.) (Emphasis added to highlight the portion the appellant finds objectionable.)

"[T]he prosecution must avoid statements that suggest to the jury that there exists evidence of a defendant's guilt that was not placed before the jury...." *Roberts v. State,* 735 So.2d 1244 (Ala.Cr.App.1997). When the comment alleged to be inappropriate is examined in context, it is clear that the prosecution was not suggesting that there was other evidence of the appellant's guilt. On the contrary, the prosecutor informed the jury that there was no additional evidence. Furthermore,

although the actual fibers were not admitted into evidence, the jury was aware of the existence of the fibers because of the testimony from the trace evidence technician. The technician testified that the fibers had been collected from the thigh and calf area of the victim's leg, and that the fibers were not consistent with the victim's clothing. Accordingly, the prosecutor's reference to the fact that the trial court sustained defense counsel's objection to the admission of the actual fibers does not rise to the level of plain error.

F.

The appellant maintains that the district attorney improperly vouched for the credibility of a witness and that he commented on matters not in evidence. Specifically, he suggests that the prosecutor committed plain error when he argued to the jury that Investigator Bud Parker had taken numerous statements from defendants and that Parker had testified many times in trials that resulted in convictions. We disagree.

During defense counsel's closing argument, counsel suggested that the appellant's statement to police during the investigation was not credible. Counsel argued:

> "This statement and the inconsistencies these officers say, that—I hope, if you have listened and remember the testimony, look at all of these exhibits and testimony, you will say there is reasonable doubt that these officers didn't make this statement up completely. And it's real important, because if you look at it, it's signed by Officer Parker. And I

guess the thing that bothers me most about that testimony, is that Officer Parker, Officer Renfroe testified we have got this thing called the waiver of rights form, the City of Huntsville has these, and they say we have them out in the file cabinet or some type of bin, but he says we don't use them. He doesn't testify why they have them if they don't use them, but he says we don't have to use them, we are not required to use them. And then he states 'I don't ever use them.' He says—and I believe it was Renfroe—he says, 'I have used them twice.' And Parker says he doesn't use them, he has never used them.

"And they testify-Bud Parker says, 'I have a tape recorder,' he says, 'I have got it down there.' He said, 'I didn't use it.' He says, 'We have got video equipment.' He says, 'Yeah, part of it was working, but part of it wasn't. The part I can bring to court and show you, no, that wasn't working.' And he says, 'Well, my tape recorder-yeah, I have got a tape recorder,' he says, 'but I didn't tape it, didn't want to.' And it's important, of course, that he doesn't say that until the end of the statement. He says, 'Well, oh, I asked Derrick these questions, too.' He didn't ask Derrick at the beginning of that, that's something he thought of at the end of that statement, 'Well, let me put in here that I asked him these things.' Because he knew this thing-this case was coming to court, and he knew when he got in front of this jury he was going to have to explain to you why he didn't tape-record it, he didn't videotape it, he didn't get a waiver

> form. And most importantly, this statement, why he wrote it and he signed it and not Mr. Mason. That's also important. And this bothers me. He says, 'I took all these notes.' The problem is, he didn't have any of those notes. He has got it typed up, that he did later. He doesn't bring those notes he says he took that day. 'Too many documents, we throw those away.' 'We have about 14 homicides a year,' I believe he testified to, 'but we don't keep any sheets.' And I think there is a good reason for that."

(R. 1391-93.)

In the prosecutor's rebuttal closing argument, he argued, in relevant part:

> "Whether or not any of these officers use a form, a waiver of rights form, is another smoke screen. Absolutely no bearing on this case. If you believe Officer Parker, Detective Parker, one of the most experienced homicide investigators we have got, one who has investigated hundreds of homicide cases in his career, who has interviewed and taken statements from numerous defendants, who has testified any number of times in a court of law which led to convictions of defendants based on those statements, if you don't believe what he told you that the defendant told him, so be it. But whether or not he used a form called a waiver of rights form has absolutely nothing to do with the truth of his testimony."

(R. 1439-40.)

The prosecutor's statements were in response to the intimation by defense counsel that the police

officers had fabricated the appellant's statement. Counsel is given wide latitude in responding to arguments made by opposing counsel. *Chandler*, 615 So.2d at 110. Moreover, Detective Parker testified that he had been a homicide detective since 1980, that he had worked on "hundreds" of homicide cases, and that he had testified "hundreds" of times in court. (R. 1227.) Accordingly, the prosecutor's comment on Detective Parker's vast experience was a legitimate inference from the record and does not constitute plain error.

II.

The appellant alleges that comments made by the prosecution during the sentencing phase of the trial diminished the importance of the jury's role in sentencing, in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). In support of his contention, the appellant cites comments by the prosecution in its rebuttal closing argument in which the prosecution told the jury that its sentencing verdict was an advisory verdict. The appellant concedes that the prosecution correctly stated the law, but he maintains that the prosecution's "repeated" emphasis that the jury's verdict was advisory diminished "the jury's sense of responsibility." (Appellant's brief, p. 17.) The appellant did not object to the allegedly inappropriate comments in a timely manner; thus, his assertion must be reviewed under the plain error doctrine. Rule 45A, Ala.R.App.P.

"In *Martin v. State*, 548 So.2d 488 (Ala.Cr.App.1988), *aff'd*, 548 So.2d 496 (Ala.1989), *cert. denied*, 493 U.S. 970, 110 S.Ct. 419, 107 L.Ed.2d 383 (1989), this Court reiterated the rule enunciated in *Caldwell v. Mississippi*, that the prosecutor could not mislead a jury to believe that, while it may impose a death sentence upon a defendant, the ultimate responsibility for determining the appropriateness of the death sentence lay elsewhere. The *Martin* Court stated as follows:

> "'Under *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231 (1985), "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." However, the comments of the prosecutor and the instructions of the trial court accurately informing a jury of the extent of its sentencing authority and that its sentence verdict was "advisory" and a "recommendation" and that the trial court would make the final decision as to sentence does not violate *Caldwell*. "Comments which accurately explain the respective functions of the judge and jury are permissible under *Caldwell* 'as long as the significance of [the jury's] recommendation is adequately stressed.'" *Harich v. Wainwright*, 813 F.2d 1082, 1101 (11th Cir.1987). Here, neither the prosecutor

> nor the trial court misrepresented the effect of the jury's sentencing recommendation. The cases of *Caldwell,* supra; *Mann v. Dugger,* 817 F.2d 1471 (11th Cir.), vacated, 828 F.2d 1498 (1987); *Adams v. Wainwright,* 804 F 2d 1526 (11th Cir.1986), modified, *Adams v. Dugger,* 816 F.2d 1493 (11th Cir.1987); and *Harich,* supra, each involved a situation where the prosecutor and the trial court misled the jury as to its critical role in sentencing under state law. In *Hooks v. State,* 534 So.2d 329 (Ala.Cr.App.1987), this Court reviewed the decisions of other jurisdictions which have confronted this issue and concluded: "The trial judge's and the prosecutor's remarks clearly defined the jury's role in the sentencing scheme. Thus, the jury could not have been confused as to its responsibility in the sentencing process. The remarks made here were a correct statement of the law and did not tend to mislead or misinform the jury. Therefore, we conclude the remarks were not improper under *Caldwell,* supra."'
>
> "548 So.2d at 494."

Travis v. State, [Ms. CR-92-958, April 18, 1997] ___ So.2d ___ (Ala.Cr.App.1997). See also, *Price v. State,* 725 So.2d 1003 (Ala.Crim.App.1997); *Ex parte Taylor,* 666 So.2d 73 (Ala.1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996).

We have reviewed the prosecution's entire closing argument, including the allegedly inappropriate comments and the context in which they were made. From our review of the record, it appears that the prosecution's comments were made in response to comments by defense counsel during its closing argument, in which defense counsel suggested several times that the jury had the ultimate authority in determining whether the appellant lived or died. Counsel has the right to reply in kind. *Taylor*, 666 So.2d at 88. Furthermore, as the appellant concedes, the prosecution's comments are a correct statement of the law in Alabama. After reviewing the prosecution's argument in its entirety, as well as the context in which the allegedly inappropriate comments were made, we find that "there is 'no reasonable possibility that the jury was misled, misinformed, or confused as to its critical role in sentencing under Alabama law.'" *Price*, quoting *Taylor v. State*, 666 So.2d 36, 51 (Ala.Cr.App.1994). "The prosecutor's comments . . . 'accurately informed the jury of its sentencing authority and in no way minimized the jury's role and responsibility in sentencing.'" *Weaver v. State*, 678 So.2d 260, 283 (Ala.Crim. App.1995), rev'd on unrelated ground, 678 So.2d 284 (Ala.1996). Accordingly, the prosecution's comments do not constitute plain error.

III.

The appellant maintains that the trial court erred in denying his motion to suppress the evidence discovered in his automobile because, he argues, the inventory search of the car was "not

performed according to any standardized procedure." (Appellant's brief, p. 19.) Specifically, he contends that "[t]here was no testimony in this case regarding any standardized criteria established by the Huntsville Police Department for the inventory search of automobiles." (Appellant's brief, p. 19.)

Initially, we note that although the appellant filed three suppression motions, he did not argue this particular ground in any of those motions. While the appellant's attorneys did allude to this ground during their questioning of the police officers at the suppression hearing, counsel did not specifically move to suppress the evidence found in the appellant's car on this basis. At the conclusion of the hearing, one of the appellant's counsel indicated that she might later want to amend the appellant's suppression motions to add as a ground that the inventory search was not performed according to standardized procedure; however, the record contains no indication that the motions were amended to include this as a ground. Accordingly, we must review the appellant's allegation under the plain error doctrine. Rule 45A, Ala.R.App.P. While his failure to object does not preclude review, it does weigh heavily against him. *Kuenzel v. State,* 577 So.2d 474 (Ala.Cr.App.1990), aff'd, 577 So.2d 531 (Ala.1991).

> "In *Ex parte Boyd,* 542 So.2d 1276 (Ala.), cert. denied, 493 U.S. 883, 110 S.Ct. 219, 107 L.Ed.2d 172 (1989), the Alabama Supreme Court explained the requirements of a valid inventory search of an impounded automobile and any containers located therein, whether conducted at the scene of the arrest or after it

has been towed, as established by *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), and *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987). In addition to proving the lawfulness of the arrest of the accused and the impoundment of the car, the state must establish that the inventory was accomplished through standard police procedures:

> "'[T]he record *must* sufficiently reflect *what that policy is*, describe the policy in such a way that its *reasonableness can be reviewed*, and present adequate evidence of *what the employed criteria were*.'
>
> "542 So.2d at 1283 (emphasis original). . . .
>
> "'[A] police officer's conclusory testimony that the inventory was done in compliance with departmental regulations' is, by itself, insufficient to bring the search within the inventory exception. *Boyd*, 542 So.2d at 1282. Further, the absence of an inventory list and the fact that inventories are not uniformly conducted throughout the police department involved lend support to an inventory's not qualifying as a lawful search. *Boyd*, supra."

Sheffield v. State, 606 So.2d 183, 186-87 (Ala.Cr. App.1992).

The pertinent evidence elicited at the suppression hearing established the following. Within a few days after the murder, the police received a tip that the appellant was the killer. The police subsequently discovered that the appellant had an outstanding warrant for assault in the third

degree. A "be-on-the-lookout" was issued. On the evening of March 29, 1994, Officer James Goings and his partner spotted the appellant's vehicle and followed it into the parking lot of a fast-food restaurant. Officer Mark Plemons and his partner followed Goings's vehicle into the parking lot. Goings stopped the appellant's vehicle when it entered the drive-through lane of the restaurant. The appellant was asked to exit his vehicle, and he complied. He was placed under arrest by Officer Plemons, who had the outstanding arrest warrant.

Within a few minutes, Officer Dwight Hasty arrived at the scene. The appellant had already been arrested and placed in a patrol car. Hasty and Investigator Lisa Hamilton performed an inventory search of the appellant's vehicle. Hamilton searched the vehicle, and Hasty recorded the items that Hamilton found on an inventory sheet. A gun that was subsequently determined to be the murder weapon and a clip containing ammunition were found between the front seats of the vehicle. The officers also found "three cassette tapes, a cassette player with headphones, a pager, Kodak 400 film, a bag of miscellaneous clothing and other paper items." (R. 149.)

Hasty testified that police policy authorized them to impound a vehicle if the seizure of the vehicle is incident to arrest or if the vehicle is a traffic hazard, or is obstructing "driveways." (R. 147.) Hasty testified that the appellant's vehicle was blocking the drive-through lane of the restaurant. He further testified that it was department policy to *always* perform an inventory search of the vehicle before the wrecker removed the vehi-

cle from the scene. Hasty testified that the purpose of the inventory was to protect both the police and the owner of the vehicle from theft that might result while the vehicle was impounded. Hasty identified the impoundment sheet that he prepared at the scene. Compare *Sheffield*, 606 So.2d 183, 187 ("the absence of an inventory list and the fact that inventories are not uniformly conducted throughout the police department involved lend support to an inventory's not qualifying as a lawful search"). Officer Hasty indicated that he does not generally record such items as empty cans, or things of that nature, because, he suggested, they have no value.

In addition to Hasty's testimony regarding the inventory procedures, Officer Goings testified that police policy authorizes officers to impound a vehicle if it is a traffic hazard, or if the vehicle is on property belonging to someone other than the owner of the vehicle and is "blocking their business" (R. 116.), or if the vehicle is going to be used as evidence in a trial. He testified that police policy dictates that in order to impound the vehicle, the police must inventory "all the contents, [and] damage on it, as far as the windows, tires, body work, [and] paint." (R. 116.) Goings said that the results of the inventory are reported on an inventory sheet. He testified that, typically, the inventory is performed in the area where the vehicle is located; however, he indicated that if the vehicle is parked in a dangerous area, such as on a road, the police will move the vehicle to the side of the road before performing the inventory. Goings said that the appellant's vehicle had to be moved because it was blocking the drive-through lane of

the fast-food restaurant. Goings thought that the "special operations division" had a copy of the police department's policy on impounding vehicles. (R. 118.)

The appellant does not dispute the legality of his arrest, and he does not argue that the officers lacked authority to impound his vehicle. Even, however, had he made such an argument, we would find that the arrest of the appellant and the impoundment of his vehicle were proper. The appellant's custodial arrest was pursuant to an outstanding warrant for assault in the third degree, the validity of which the appellant does not dispute. Furthermore, once the appellant was placed under custodial arrest, the officers acted reasonably in impounding the appellant's vehicle.

> " 'Impoundment has . . . been justified on the grounds that it is necessary to protect the vehicle from damage and the police from liability.' *Morton v. State,* 452 So.2d 1361, 1366 (Ala.Cr.App.1984), (overruled by *Cannon v. State,* 601 So.2d 1112, 1115 (Ala.Cr.App.) 'to the extent that *Morton* holds that a driver must be given an election on whether to have his vehicle impounded or left where parked', cert. denied, 601 So.2d 1112 (Ala.Crim. App.1992)). In *United States v. Martin,* 982 F.2d 1236, 1240 (8th Cir.1993), the court found the impoundment of a legally parked vehicle proper where the owner left the scene for a 'suspicious length of time despite his promise to return, making it likely that no one would claim custody of the unlocked vehicle, which had valuable equipment inside in plain view.' The Eighth Circuit Court in *Martin*

> stated that '[p]olice may take protective custody of a vehicle when they have arrested its occupants, *see Colorado v. Bertine,* 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), even if it is lawfully parked and poses no public safety hazard. See *United States v. Staller,* 616 F.2d 1284, 1289-90 (5th Cir.), cert. denied, 449 U.S. 869, 101 S.Ct. 207, 66 L.Ed.2d 89 (1980).' *Martin,* 982 F.2d at 1240. In *United States v. Ponce,* 8 F.3d 989, 996 (5th Cir.1993), the Fifth Circuit Court of Appeals concluded that the 'district court did not err in concluding that [the police officer] "acted appropriately and legally when he decided to impound and inventory [the appellant's] truck" ' where the appellant's truck was properly parked in the parking lot of the parole office, because impounding the automobile 'ensured that the truck was not left in a public parking lot where it could have become a nuisance, and where it could have been damaged or stolen.' *Ponce,* 8 F.3d at 996. Cf. *Riley v. State,* 583 So.2d 1353, 1355 (Ala.Cr.App.), cert. denied, 583 So.2d 1356 (Ala.1991) (vehicle improperly impounded where 'there is no indication in the record that the impoundment of the vehicle was necessary to protect the vehicle from damage or to protect the police from liability')."

Webster v. State, 662 So.2d 920, 922-23 (Ala.Cr.App.1995). See also *Cannon v. State,* 601 So.2d 1112 (Ala.Cr.App.1992) (the fact that a vehicle was on private property did not preclude impoundment of the vehicle).

Contrary to the appellant's assertion, there was evidence regarding the police department's policy on inventory searches. While the testimony regarding the inventory procedures was not as detailed as it could have been, there was sufficient evidence produced to determine that there was a policy, what that policy was, the reasonableness of the policy, and that the officers acted in compliance with the established criteria when they conducted the inventory search—especially in light of the fact that the appellant did not raise this particular ground either before or during the suppression hearing, where it could have been thoroughly addressed. Accordingly, we find no plain error in the trial court's denial of the appellant's motion to suppress the evidence found in his vehicle.

Even if we were to conclude that the search was not authorized pursuant to an inventory search, the trial court's denial of the motion to suppress is due to be affirmed because the search of the appellant's vehicle was lawful as a search incident to an arrest. *Sheffield,* 606 So.2d at 187. This is so even though the appellant was already handcuffed and placed in the police officer's car when the appellant's car was searched. *Gundrum v. State,* 563 So.2d 27 (Ala.Crim.App.1990).

IV.

The appellant contends that the trial court erred in denying his motion to suppress his custodial statement because, he claims, "his arrest on the third-degree assault was merely a pretext for the police to interview him about the homicide of

Ms. Cagle." (Appellant's brief, p. 20.) As we noted in Part III of this opinion, the appellant filed three suppression motions; this ground was not specifically raised in any of those motions. Furthermore, although the appellant hinted at this ground during the suppression hearing, he did not specifically move to suppress his confession on this basis. Accordingly, we must review his assertion pursuant to the plain error doctrine. Rule 45A, Ala.R.App.P.

The pertinent evidence presented at the suppression hearing established the following. The appellant was arrested pursuant to an outstanding arrest warrant against him for third-degree assault. Following the appellant's arrest, he was transported to the criminal investigation division (CID). En route to CID, the appellant asked what he was being arrested for and the officers told him he was being arrested for third-degree assault, and then an officer read him the arrest warrant. On the way to CID, there was no discussion regarding the murder of Angela Cagle.

At CID, the appellant was fingerprinted, photographed, and apprised of his rights. The appellant did not appear to be under the influence of alcohol or drugs. The appellant waived his rights and spoke with investigators about the assault charge. During the questioning regarding the assault charge, the investigators learned that a victim of a robbery and an assault that had occurred approximately two weeks earlier had identified the appellant as the assailant from a photographic line-up. The appellant was then informed that he was under arrest for robbery and attempted murder. He was again apprised of his

rights. The appellant waived his rights and denied any knowledge of the robbery/attempted murder incident.

An investigating officer then questioned the appellant about the gun found in the appellant's vehicle. The appellant admitted that he had a gun in his vehicle, but he said that it did not belong to him. During the course of the questioning, the investigating officers were informed that the gun found in the appellant's vehicle was the murder weapon. When the appellant was confronted with this information, he denied any knowledge of the murder.

The appellant subsequently asked to speak with Investigator Bud Parker alone. Parker again advised the appellant of his rights. The appellant waived his rights and confessed to the murder of Angela Cagle.

> "'In *Scarbrough [v. State,* 621 So.2d 996 (Ala.Cr.App.1992)], we adopted the "objective" test set forth by the Fifth Circuit Court of Appeals with regard to determining the validity of an alleged pretextual arrest:
>
> > "'"'Again and again in precisely the present context, the [Supreme] Court has told us that where police officers are objectively doing what they are legally authorized to do—as in arresting [the defendant] pursuant to the valid warrant outstanding against him and interrogating him without coercion after reading him repeated Miranda warnings—the results of their investigations are not to be called in question on the basis of any

> subjective intent with which they acted. . . .
>
> "'"'. . . The relevant principle of the Supreme Court is likewise: so long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry. . . . The correct rule is that, while a showing of objectively reasonable good faith on the part of the police officers will ordinarily redeem honest errors and prevent the application of the exclusionary rule, in a case where the officers have taken no action except what the law objectively allows [,] their subjective motives in doing so are not even relevant to the suppression inquiry. And the reason lies in the purpose of that rule: to deter unlawful actions by police. Where nothing has been done that is objectively unlawful, the exclusionary rule has no application and the intent with which they acted is of no consequence.' "
>
> "' " . . . .
>
> "'*United States v. Causey*, 834 F.2d 1179, 1184-85 (5th Cir.1987) (emphasis in original) (footnotes omitted)." *Scarbrough*, 621 So.2d at 1004."

Webster v. State, 662 So.2d 920, 921-22 (Ala.Cr. App.1995), quoting *Fletcher v. State*, 621 So.2d 1010, 1022-23 (Ala.Cr.App.1993). See, also, *Hutcherson v. State*, 677 So.2d 1174 (Ala.Cr.App.1994),

rev'd on unrelated ground, 677 So.2d 1205 (Ala.1996).

In this case, the police arrested the appellant pursuant to an outstanding warrant for third-degree assault. The appellant does not challenge the validity of the arrest warrant. The evidence established that the appellant was advised of his rights three separate times, and that each time he knowingly and voluntarily waived his rights and spoke with the police. There was no evidence that the appellant was under the influence of drugs, or that his confession was coerced by inducements or threats. "As long as the police officer is doing only what is objectively authorized and legally permitted, the officer's subjective intent in doing it is irrelevant." *Ex parte Scarbrough,* 621 So.2d 1006, 1010 (Ala.1993). In this case, the officers' arrest and questioning of the appellant were objectively reasonable; accordingly, we find no plain error in the trial court's denial of the motion to suppress the appellant's custodial statement.

V.

The appellant contends that the trial court's refusal to order the state to disclose the identity of the person who told Investigator Renfroe that the appellant had committed the murder constitutes reversible error. We disagree.

Before trial, the appellant filed several motions that, in essence, requested that the trial court order the state to reveal the identity of the person who had told the investigating officer that the appellant committed the offense. The appellant's motions were discussed several times during var-

ious pre-trial hearings and again at trial. The state objected to disclosing the person's identity, arguing that the person who had furnished the appellant's name to Investigator Renfroe was merely a "tipster," and was not a material witness. The state also objected on the basis that the disclosure of the tipster's identity could jeopardize that person's safety. The trial court agreed with the state and denied the appellant's motion.

The appellant intimates that the trial court's failure to order the state to reveal the identity of the informant violates the principle of *Ex parte Monk*, 557 So.2d 832 (Ala.1989), which, he suggests, mandates an "open file" policy and thus entitles him to the "names and addresses of any persons with knowledge of any facts surrounding the death of Angela Michele Cagle." (Appellant's brief, p. 21.) While *Monk* does encourage liberal discovery in capital murder cases, it does not mandate that the state disclose to a defendant the name and address of *every* individual who has furnished information to the state in the investigation of a crime; rather, "*Monk* made it clear that whether to order discovery beyond that required by the constitution or by state law or rule is discretionary with the trial court." *Council v. State*, 682 So.2d 500, 501 (Ala.1996) (Hooper, C.J., concurring specially in denial of certiorari review).

We find no abuse of discretion in the trial court's refusal to order the disclosure of the name of the individual who furnished the appellant's name to Investigator Renfroe.

> "Since *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), it is clear that the general rule of nondisclosure of wit-

> nesses is not always applicable to the government informant. *In cases involving the 'tipster' type of informant, who merely conveys information to the government but neither witnesses nor participates in the offense, courts generally hold that the disclosure of his identity is not material and, therefore, not required.*"

Self v. State, 420 So.2d 792, 795 (Ala.Cr.App. 1981), rev'd, 420 So.2d 798 (Ala.1982) (emphasis added).[3]

> " 'Generally speaking, where the identity of a confidential informer is sought on the issue of guilt or innocence, and the alleged informer is shown to have been a participant in the transaction constituting the offense, the prosecution is required to disclose his identity and address on the request of the accused. *The rule does not apply, however, to an informer who is involved in only an indirect way, such as a "tipster."*' "

Lightfoot v. State, 531 So.2d 57, 58 (Ala.Cr.App. 1988) quoting 33 Am.Jur.P.O.F.2d 549 *Criminal Law: Need for Disclosure of Identity of Informant*, at 559, 563 (1983) (emphasis added). See also, *Garner v. State*, 606 So.2d 177 (Ala.Cr.App.1992); *Colbert v. State*, 615 So.2d 1213 (Ala.Cr.App.

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[3] The issue in *Self* was not whether the state had to disclose the identity of a confidential tipster, rather, the issue in *Self* was whether the state had an obligation to secure the presence at trial of a state's informant, who was a material witness and whose identity was known by both the state and the defense

1992), rev'd on an unrelated ground, 615 So.2d 1218 (Ala.1992).

The record supports the state's contention that the individual who had provided the information in this case was merely a "tipster," and not a material witness to the crime. The "tipster" was not present at the crime, nor did the "tipster's" assertion that the appellant was the perpetrator provide the probable cause to arrest the appellant-the probable cause to arrest the appellant arose from an outstanding warrant for third-degree assault. See *Harrell v. State*, 555 So.2d 257, 261 (Ala.Cr.App.1989) ("[t]he informant . . . was a mere 'tipster' and was not a participant in the crime and did not provide probable cause for the arrest"). Moreover, the state demonstrated a compelling need to keep the individual's identity confidential.

The appellant did not prove at trial, nor does he demonstrate on appeal, how he was prejudiced by the failure of the trial court to order that the state disclose the identity of the individual. Accordingly, the trial court did not err in refusing to order the state to disclose the identity of the person who told the investigating officer that the appellant was the perpetrator.

The appellant also argues that the trial court erred to reversal in allowing Investigator Renfroe to testify to the substance of his conversation with the "tipster." He contends that Renfroe's testimony regarding what the individual had told him constitutes inadmissible hearsay. The appellant did not object to Renfroe's testimony; therefore, this Court must review this issue pursuant to the plain error doctrine. Rule 45A, Ala.R.App.P.

Investigator Renfroe's testimony did not constitute inadmissible hearsay because it was not offered to prove the truth of what the "tipster" told Renfroe; rather, it was offered to explain Renfroe's actions and the sequence of events following his conversation with the "tipster." See *Sawyer v. State,* 598 So.2d 1035, 1038 (Ala.Cr.App.1992), cert. denied, 506 U.S. 943, 113 S.Ct. 386, 121 L.Ed.2d 295 (1992); and *D.R.H. v. State,* 615 So.2d 1327 (Ala.Cr.App.1993). Moreover, following Investigator Renfroe's testimony, the trial court thoroughly cautioned the jury that Renfroe's testimony regarding statements made to him during the course of his investigation were not offered to prove the truth of those statements; rather, the testimony was offered as an explanation of the sequence of events and to explain Renfroe's actions. "[T]he trial judge's thorough limiting instruction was more than adequate to explain to the jury the purpose for which the evidence was received." *Roper v. State,* 695 So.2d 244, 246 (Ala.Cr.App.1996), cert. denied, 695 So.2d 249 (Ala.1997). Accordingly, we find no error in allowing Detective Renfroe to testify to the substance of his conversation with the "tipster."

VI. and VII.

The appellant contends that the trial court improperly allowed the jury to consider as an aggravating circumstance that the offense was "especially heinous, atrocious or cruel compared to other capital offenses"[4] (Issue VI), and the trial

[4] See § 13A-5-49(8), Code of Alabama 1975

court improperly found the existence of this aggravating circumstance (Issue VII). The gist of the appellant's argument is that the finding of this aggravating circumstance is based primarily on the assumption that the first bullet wound did not kill the victim, but caused the victim substantial pain-a finding that, he claims, is not supported by the record. In support of his contention, he argues that because the forensic pathologist who performed the autopsy on the victim could not conclusively determine which of the two bullet wounds occurred first, there was no evidence to support a finding that the first wound to the victim caused severe pain and suffering, but did not kill the victim. The appellant did not object to the submission of this aggravating circumstance to the jury, nor did he object to the trial court's finding of this aggravating circumstance; therefore, his assertions must be reviewed pursuant to the plain error doctrine. Rule 45A, Ala.R.App.P.

While it is true that the forensic pathologist was not able to conclusively determine which bullet wound occurred first, a reasonable inference from the record is that the painful, nonfatal injury occurred first. Dr. Embry testified that the bullet wound to the victim's left cheek was fairly superficial in that it would not cause loss of consciousness or death; however, he testified that such a wound would be extremely painful. Dr. Embry testified that the victim would still have been able to move her legs after the gunshot wound to the left cheek. According to Dr. Embry, the gunshot wound to the victim's right cheek was "instantly" fatal—the victim could not have moved her leg after suffering the bullet wound to the right

cheek. The appellant confessed that he shot the victim a second time *after* he saw her move her leg. Furthermore, she was found lying on her left side; the bullet wound to her right cheek was clearly visible. Thus, one can reasonably infer from the evidence that the first bullet wound caused the victim great suffering, but that it did not kill her.

Moreover, the determination of the existence of the aggravating circumstance that the crime was especially heinous, atrocious, or cruel compared to other capital offenses was not based solely on the fact that the first bullet wound caused the victim great suffering; rather, it was based on a combination of factors. The trial court found, in pertinent part:

> "The capital offense was especially heinous, atrocious or cruel compared to other capital offenses. The Court reaches this conclusion based upon the following evidence:
>
> "(a) The victim, Mrs. Cagle, was alone, defenseless and of no physical threat to the Defendant.
>
> "(b) The Defendant caused or directed the victim to disrobe in his presence, obviously inflicting great fear and humiliation in the victim prior to her death. There is no logical explanation for this behavior on the part of the Defendant except his indifference and even enjoyment of the suffering of this victim.
>
> "(c) The victim was shot twice at close range as indicated by the expert testi-

mony. The first shot did not kill the victim but caused great pain as a result of the shattering of the bone or bones in her face. The second shot was fired into her face as she lay helpless and suffering from the first gunshot wound to the other side of her face.

"(d) The Defendant planned this crime in advance, obtaining the gun used to kill the victim several days earlier and by parking his vehicle out of view and behind the store.

"(e) The Defendant intended to kill the victim by shooting her the second time, realizing that she was still alive, so that there would be no witness to this crime.

"(f) The most heinous, atrocious or cruel aspect of this crime was the execution-style killing of this victim. The court can conclude from the evidence presented, and from the confession of the Defendant, that he first made the victim go into the back storage room of the convenience store, which was not visible from the other parts of the store, or to anyone who might pass. He caused the victim to completely disrobe except for her socks, all of her clothing being found under or near the desk on which her body was found. He shot her at close range while she sat naked and completely vulnerable to the actions of the Defendant. Realizing that Mrs. Cagle was not dead because he saw her move, he inflicted the fatal gunshot wound at close

> range into the right side of her face. The Court concludes that the crime of this Defendant was extremely wicked, shockingly evil, outrageously wicked and vile and cruel, with the actions of the Defendant designed to inflict a high degree of pain and fear in the victim, with utter indifference to, or even enjoyment of, the suffering of this victim. Any murder of a defenseless victim is to some extent heinous, atrocious and cruel, but the degree of heinousness, atrociousness and cruelty, with which this offense was committed, exceeds that common to all capital offenses."

(C.R.253-54.)

As evidenced from the above, the finding that the crime was especially heinous, atrocious, or cruel when compared to other capital offenses was based not only on the fact that the first bullet wound caused the victim intense pain, but also on the manner of the murder, as well as the fear and humiliation that the victim most certainly experienced before her death. These are appropriate factors to consider in determining the existence of this aggravating factor. See *Ex parte Rieber,* 663 So.2d 999 (Ala.1995). Accordingly, the trial court did not err in allowing the jury to consider as an aggravating factor that the crime was especially heinous, atrocious, or cruel, nor did it err in finding the existence of this aggravating circumstance.

VIII.

The appellant maintains that the trial court erred in denying his request to visit the scene of the crime with his attorneys. He argues that the trial court's refusal to allow him to visit the scene with his attorneys denied him the effective assistance of counsel.

In a pretrial motion hearing, the trial court denied the appellant's request to visit the scene of the crime with his attorneys. The trial court ruled that because the appellant was being held in jail without bond, the court could not allow the appellant to visit the scene without a compelling reason to do so; however, the trial court indicated that the appellant's counsel were free to visit the scene. The appellant did not offer the trial court any reason he needed to view the scene of the crime-other than his general assertion in his written motion that his presence at the scene was necessary to assist his counsel in the investigation of the crime-nor did he specifically explain how his defense would be prejudiced if he were not allowed to view the scene. Accordingly, we find no error in the trial court's denial of the appellant's motion to view the scene of the crime with his attorneys.

Moreover, the appellant has not established how the trial court's ruling denied him the effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, the appellant must show that his counsel's performance was deficient and that, but for his counsel's deficient performance, the result of the proceedings would have been different. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The

appellant has met neither prong of the two-pronged test set out in *Strickland*. The appellant does not indicate how the trial court's ruling rendered his counsel's performance deficient, nor does he explain how his viewing the scene of the crime with his attorneys could have changed the outcome of the proceedings. Accordingly, the appellant is due no relief on his assertion that the trial court's refusal to allow him to visit the scene denied him the effective assistance of counsel.

IX.

The appellant contends that he was denied the effective assistance of counsel as a result of:

> "A. [T]he failure of trial counsel to object to impermissible closing arguments of the prosecutors during the guilt phase;
>
> "B. [T]he failure of trial counsel to object to impermissible closing argument of the prosecutors during the penalty phase;
>
> "C. [T]he failure of trial counsel to object to hearsay testimony by an alleged confidential informant;
>
> "D. [T]he agreement to stipulate to the admissibility of certain items of evidence without the state having to prove a proper chain of custody; and
>
> "E. The failure to object to the jury charge regarding 'especially heinous, atrocious or cruel.'"

(Appellant's brief, p. 27.)

Pursuant to the procedure outlined in *Ex parte Jackson,* 598 So.2d 895 (Ala.1992),[5] appellate counsel filed a motion for a new trial, in which counsel asserted, in very general terms, that the appellant had received ineffective assistance of trial counsel.[6] A hearing was conducted on the motion. During the hearing, appellate counsel advanced several of the above grounds in support of the appellant's contention that his trial counsel had been ineffective; however, neither the appellant nor his trial attorneys testified at the hearing. The trial court denied the appellant's motion for a new trial.

Although the appellant did not present all of the above allegations of ineffective assistance of counsel to the trial court, this Court is obliged to review the appellant's allegations pursuant to the plain error doctrine. Rule 45A, Ala.R.App.P.

> "In order to prevail on an ineffective assistance of counsel claim, a defendant must meet the two-pronged test set out by *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
>
> > "'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made

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[5] In *Ex parte Ingram,* 675 So.2d 863 (Ala.1996), the Alabama Supreme Court overruled *Ex parte Jackson* "to the extent that it allows a defendant's newly appointed appellate counsel to move to suspend the Rule 24.1(b), Ala R Crim P , 30-day jurisdictional time limit for new trial motions." 675 So.2d at 865.

[6] The appellant was represented by different counsel at trial and on appeal.

> errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.'

"*Id.* at 687, 104 S.Ct. 2052.

" 'The performance component outlined in *Strickland* is an objective one: that is, whether counsel's assistance, judged under "prevailing professional norms," was "reasonable considering all the circumstances." ' *Daniels v. State,* 650 So.2d 544, 552 (Ala.Cr.App.1994) (quoting *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052). Once a defendant has identified the specific acts or omissions that allegedly were not the result of reasonable professional judgment on counsel's part, the court must determine whether those acts or omissions fall outside the wide range of professionally competent assistance. *Id.*

"When reviewing a claim of ineffective assistance of counsel, we indulge a strong presumption that counsel's conduct was appropriate and reasonable. *Hallford v. State,* 629 So.2d 6 (Ala.Cr.App.1992), *cert. denied,*

511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 491 (1994); *Luke v. State*, 484 So.2d 531 (Ala.Cr.App.1985).

> "'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'

"*Strickland,* 466 U.S. at 689, 104 S.Ct. 2052 (citations omitted). See *Ex parte Lawley,* 512 So.2d 1370, 1372 (Ala.1987).

"And, even if an attorney's performance is determined to be deficient, the petitioner is not entitled to relief unless it is also established that 'there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052.

"In an ineffective assistance of counsel claim, the burden is on the claimant to show that his counsel's assistance was ineffective. *Ex parte Baldwin,* 456 So.2d 129 (Ala.1984), *aff'd,* 472 U.S. 372, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985)."

McNair v. State, 706 So.2d 828 (Ala.Cr.App.1997).

The appellant has met neither prong of the *Strickland* test. First, the appellant has not demonstrated that his trial counsel's performance was deficient. As noted, neither the appellant nor his trial attorneys testified at the hearing. The arguments of the appellant's counsel in support of the motion for a new trial are not evidence. *Arnold v. State,* 601 So.2d 145, 154 (Ala.Cr.App.1992). Without more, it is impossible to determine trial counsel's rationale for not objecting to the allegedly improper conduct or comments. Accordingly, the appellant has not " 'overcome the presumption that, under the circumstances, [counsel's actions] "might be considered sound

trial strategy." '" *McNair,* 706 So.2d at 839, quoting *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052.

Even if we were to assume for the sake of argument that counsel's performance was deficient, the appellant has not proven that he was prejudiced by counsel's performance. All of the claims underlying the appellant's allegations of ineffective assistance of counsel—with the exception of the claim "D" above—have been addressed elsewhere in this opinion and found to be without merit. Accordingly, the appellant has failed to prove that " 'there is a reasonable probability that, but for [counsel's failure to object], the result of the proceeding would have been different.' " *McNair,* 706 So.2d at 839, quoting *Strickland,* 466 U.S at 694, 104 S.Ct. 2052.

In support of the appellant's allegation that his trial attorneys were ineffective for stipulating to the admissibility of certain evidence, the appellant refers this Court to a portion of the record in which counsel agreed to stipulate to the chain of custody on items of evidence which Investigator Glen Nunley "touched or helped bag." (R. 1317.) In that portion of the record, counsel also stipulated that it was not necessary to have the contract driver for the Department of Forensic Sciences, who transported the victim's body to and from the autopsy, testify as a chain of custody witness, and counsel stipulated to the identity of the deceased. Other than his broad assertion that there is no evidence that he agreed to the stipulations, and that any such stipulations should be considered ineffective assistance "as a matter of law" (Appellant's brief, p. 29), the appellant does not demonstrate how counsel's stipulations constituted

ineffective assistance. Again, the appellant has failed to overcome the presumption that counsel's conduct fell " 'within the wide range of reasonable professional assistance.' " *McNair,* 706 So.2d at 839, quoting *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052. Moreover, the appellant does not even say how he was prejudiced by counsel's stipulations, and any prejudice suffered as a result of counsel's stipulations is not apparent to this Court.

Because the appellant has met neither prong of the test set forth in *Strickland,* he is due no relief on his allegations of ineffective assistance of counsel.

X.

Section 13A-5-53, Code of Alabama 1975, mandates that in addition to reviewing the case for any error involving the appellant's capital murder conviction, this Court must review the propriety of the death sentence.

> "This review shall include the determination of whether any error adversely affecting the rights of the defendant was made in the sentence proceedings, whether the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence, and whether death was the proper sentence in the case."

Section 13A-5-53(a).

Pursuant to Rule 45A, Ala.R.App.P., we have searched the entire record for any error that may have adversely affected the appellant's substantial rights, whether or not brought to our attention or

to the attention of the trial court. We find no plain error in either the guilt phase or in the sentencing phase of the proceedings.

The trial court found the existence of two aggravating circumstances: that the murder was committed while the appellant was engaged in the commission of a robbery in the first degree or an attempt thereof, and that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses. § 13A-5-49(4) and (8), Code of Alabama 1975. The trial court found the existence of two statutory mitigating circumstances: the appellant has no significant history of prior criminal activity, and that the appellant was 19 years old at the time of the crime. § 13A-5-51(1) and (7), Code of Alabama 1975. With regard to the nonstatutory mitigating factors, the trial court found:

> "The court has also considered the aspects of the Defendant's character and record, and any of the circumstances of the offense that the Defendant has offered in mitigation. Specifically, the Court has considered the family background of the Defendant, the apparent troubles that he had in the public schools of this county, the fact that he was diagnosed at an early age with attention deficit disorder, and that he cooperated with the investigators following his arrest. The Court has also considered the numerous letters addressed to this Court by friends or acquaintances of the Defendant or of his family, most of which have requested this Court impose a sentence of life without parole."

(C.R.256-57.) The trial court's findings reflect that it carefully weighed the aggravating and mitigating circumstances before sentencing the appellant to death. The trial court's findings are supported by the record.

Accordingly, because we find no plain error in either the guilt or the sentencing phase of the appellant's trial, and because we find that the trial court's findings concerning the aggravating and mitigating circumstances are supported by the record, we must now determine whether death was the proper sentence. § 13A-5-53(a), Code of Alabama 1975. In so doing, § 13A-5-53(b), requires this Court to determine:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> "(2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and
>
> "(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

We find no evidence that the appellant's sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. Our independent weighing of the aggravating and mitigating circumstances indicates that death is the proper sentence. Last, considering both the crime committed and the appellant, we find that the appellant's sentence is neither excessive nor dis-

proportionate to the penalty imposed in similar cases. Indeed, "two-thirds of Alabama's death sentences have been imposed on defendants convicted of capital murder arising out of robbery-murder." *McNair v. State,* 706 So.2d. 828 (Ala.Cr.App.1997).

Accordingly, the appellant's conviction and sentence to death are due to be, and are hereby, affirmed.

AFFIRMED.

All the Judges concur.

SUPREME COURT OF ALABAMA

No. 1971489

April 7, 2000

EX PARTE DERRICK O'NEAL MASON,
Re Derrick O'Neal Mason

—v.—

STATE,

Bruce A. Gardner of Hamilton & Gardner, Huntsville, *for petitioner*.

Bill Pryor, atty. gen., and Michael B. Billingsley, asst. atty. gen., *for respondent*.

JOHNSTONE, Justice.[1]

A Madison County jury convicted Derrick O'Neal Mason of capital murder committed during the course of a robbery in the first degree or an attempt thereof. By a vote of 10 to 2, the jury recommended that Mason be sentenced to death. The trial court followed the recommendation of the jury and sentenced Mason to death. In a unanimous decision, the Court of Criminal Appeals affirmed Mason's conviction and sentence. *Mason v. State,* 768 So.2d 981 (Ala.Crim.App.1998). On certiorari review, we affirm.

The thorough and scholarly opinion of the Court of Criminal Appeals expressly addresses the issues raised by the petitioner now before us. Our independent review of the record reveals no further arguable issues. While we agree with the result on every issue addressed by the Court of Criminal Appeals, we will address the rationale on some of these issues.

The opinion of the Court of Criminal Appeals supplies the facts of this crime. We will detail further facts only to the extent necessary to discuss particular issues.

At trial the defendant-petitioner did not preserve for review any of the issues we will discuss. Thus the issues will be considered under the "plain-error" rule.

" ' "Plain error" only arises if the error is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial

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[1] Although Justice Johnstone was not a member of this Court when this case was orally argued, he has listened to the audiotape of oral argument

proceedings.'" *Ex parte Womack*, 435 So.2d 766, 769 (Ala.1983) (quoting *United States v. Chaney*, 662 F.2d 1148, 1152 (5th Cir.1981)). *See also Ex parte Woodall*, 730 So.2d 652 (Ala.1998). "'In other words, the plain-error exception to the contemporaneous objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result."'" *Ex parte Land*, 678 So.2d 224, 232 (Ala.1996) (quoting *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (quoting *United States v. Frady*, 456 U.S. 152, 163, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982))). This Court may take appropriate action when the error "has or probably has adversely affected the substantial rights of the petitioner." Rule 39(k), Ala. R.App. P. "[A] failure to object at trial, while not precluding our review, will weigh against any claim of prejudice." *Ex parte Woodall*, 730 So.2d at 657 (citing *Kuenzel v. State*, 577 So.2d 474 (Ala.Crim.App.1990), aff'd, 577 So.2d 531 (Ala.), *cert denied*, 502 U.S. 886, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991)).

In arguing to the jury, the assistant prosecutor prefaced many of her statements with such expressions as "I believe" and "I think," without objection by the defense. The petitioner now argues that the assistant prosecutor was thereby arguing matters outside the record. Because the substance of the assistant prosecutor's statements was supported by evidence introduced during the trial, the comments were not objectionable as references to matters outside the record. Such first-person prefaces as "I believe" and "I think" should, however, be avoided inasmuch as they may be construed as the advocate's personal voucher for

the truth of the evidence, an improper practice. *See Woods v. State,* 19 Ala.App. 299, 97 So. 179 (1923), *rev'd on other grounds,* 20 Ala.App. 200, 101 So. 314 (1924), *aff'd,* 21 Ala.App. 436, 109 So. 171 (1926); and *Arthur v. State,* 575 So.2d 1165 (Ala.Crim.App.1990). *But see Williams v. State,* 710 So.2d 1276 (Ala.Crim.App.1996), *aff'd,* 710 So.2d 1350, *cert. denied,* 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998); and *Coral v. State,* 628 So.2d 988 (Ala.Crim.App.1992), *aff'd,* 628 So.2d 1004 (Ala.1993), *cert. denied,* 511 U.S. 1012, 114 S.Ct. 1387, 128 L.Ed.2d 61 (1994).

In the particular case before us, the assistant prosecutor's continual use of these first-person prefaces tends to diminish the force of her argument rather than to increase it. The evidence in this case was so emotionally compelling that its impact would have been greater had it been argued as established fact instead of personal belief. Thus, in the context of the particular facts of this case, the use of these first-person prefaces did not prejudice the defendant, much less prejudice him enough to entitle him to relief under the plain-error rule. *See e.g. Williams, supra; Ex parte Rieber,* 663 So.2d 999 (Ala.1995), *cert. denied,* 516 U.S. 995, 116 S.Ct. 531, 133 L.Ed.2d 437 (1995); and *United States v. Young,* 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

The petitioner complains that the trial court allowed the State, without objection from the defendant, to elicit testimony from the investigating officer recounting out-of-court declarations by an informant incriminating the defendant. The out-of-court declarations included an identification of the murder weapon, a description of the

defendant, the name of the defendant, and a statement that the defendant was "out of control" and that he was "trying to make a name for himself and that he was involved in this homicide." The petitioner further complains that the trial court allowed the assistant prosecutor to argue, without objection by the defendant, that, "you must simply take, because it has been held admissible, the information that the confidential informant provided, as a matter of law."

The informant's out-of-court declarations had been offered, without objection, for the dubious purpose of showing why the officer conducted his investigation and expressly not for the purpose of proving the truth of the matter stated. Likewise, the trial court had admitted this testimony expressly subject to these limitations. The out-of-court declarations would have been inadmissible hearsay for the truth of the matter stated. Rule 801 C; C. Gamble, *McElroy's Alabama Evidence*, § 242.01(2) (5th ed. 1996). Thus, to the extent that the assistant prosecutor's remarks can be construed as arguing the out-of-court declarations for the truth of the matter stated, the argument was improper.

Neither the admission of the testimony about the informant's out-of-court declarations nor the prosecutor's argument about them can work a reversal, however, unless the defendant suffered enough prejudice to meet the standards of the plain-error rule. Rule 45, Ala. R.App. P. Moreover, the plain-error rule does not entitle a defendant to relief if reasonable trial tactics or strategy could account for the defendant's not interposing an objection or otherwise preserving the matter for

review. *Hallford v. State,* 629 So.2d 6 (Ala.Crim.App.1992), *cert. denied,* 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 491 (1994); *Luke v. State,* 484 So.2d 531 (Ala.Crim.App.1985). We judge the reasonableness of such tactics or strategy from the circumstances as they would have been perceived by the defense at the time for preserving error rather than at a later time in hindsight. *Strickland v. Washington,* 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Duren v. State,* 590 So.2d 360, 362 (Ala.Crim.App.1990), *aff'd,* 590 So.2d 369 (Ala.1991), *cert. denied,* 503 U.S. 974, 112 S.Ct. 1594, 118 L.Ed.2d 310 (1992); *Falkner v. State,* 586 So.2d 39 (Ala.Crim. App.1991).

The defense may have intentionally allowed the admission of the out-of-court declarations of the informant in order to reap the mitigating benefit of the informant's statement that the defendant was "out of control." Indeed, at the sentencing phase, the defense did argue the sixth statutory mitigating factor—that "[t]he capacity of the defendant to appreciate the criminality of his conduct *or to conform his conduct to the requirements of law* was substantially impaired." (Emphasis added.) Section 13A-5-51, Ala.Code 1975.

Moreover, rulings by the trial court either excluding the informant's out-of-court declarations or prohibiting the prosecutor's argument regarding the declarations could not have substantially increased the likelihood of either an acquittal or a life-without-parole recommendation. The State's evidence against the defendant was chiefly that the authorities had seized the murder weapon from the defendant's possession and that the

defendant had given a detailed confession describing not only the murder itself but also the defendant's bizarre and cruel conduct culminating in the murder. Two police officers observed and heard the confession and recounted it to the jury with enough consistency to impart great credibility to their testimony and, indeed, just enough inconsistency in some details to prevent their testimony from being suspect as the product of improper collaboration. The out-of-court declarations by the informant pale into insignificance in comparison with this other damning evidence. Furthermore, the trial judge expressly instructed the jury not to consider the informant's out-of-court declarations for the truth of the matter stated. Thus we do not find prejudice that would warrant relief under the plain-error rule.

The defendant complains that the trial court allowed the prosecutor to argue, without objection, that the prosecutor and the assistant prosecutor represented not only the jurors but also "in some way" the defendant himself. These statements were improper and objectionable. Had the defendant objected, the trial court would have been obliged to sustain the objections and to take curative action.

In context, however, the essence of the prosecutor's argument was that, because he represented everybody in the community, he owed duties not only to prosecute the case vigorously but also to treat the defendant fairly. This description of his duties was correct. *Davis v. State,* 494 So.2d 851, 853 (Ala.Crim.App.1986); *Sprinkle v. State,* 368 So.2d 554, 561 (Ala.Crim.App.1978), *writ quashed,* 368 So.2d 565

(Ala.1979); *Gallant v. State*, 167 Ala. 60, 63, 52 So. 739, 741 (1910). In context, this argument does not warrant relief under the plain-error rule.

The petitioner further complains that the trial court allowed the prosecutor to argue, without objection, and entirely outside the record, that identifiable fingerprints could be recovered in only "one out of twenty or twenty-five cases." The purpose of this argument was obviously to refute the defendant's argument that an absence of his identifiable fingerprints at the scene of the crime indicated that he had not been present. Of course, the prosecutor's resort to fingerprint statistics entirely outside the record was improper. Had the defendant objected, the trial judge would have been obliged to sustain the objection. *Smith v. State*, 588 So.2d 561 (Ala.Crim.App.1991); *Brown v. State*, 374 So.2d 391 (Ala.Crim.App.), *aff'd*, 374 So.2d 395 (Ala.1979). Indeed, the trial judge did, on a number of occasions, instruct the jurors generally that the arguments of counsel did not constitute evidence and that the jurors should not consider the arguments as evidence.

Here again, the question is whether the improper argument prejudiced the defendant enough to warrant relief under the plain-error rule. Without the prosecutor's fingerprint statistic argument outside the record, would the jurors have been substantially more likely to conclude that the absence of fingerprints identifiable as the defendant's at the scene of the crime exonerated him? His confession and his possession of the murder weapon eclipse any such likelihood.

Finally, the petitioner complains that the trial court allowed the prosecutor to argue, without objection, in pertinent part:

> "Whether or not any of these officers use a form, a waiver of rights form, is another smoke screen. Absolutely no bearing on this case. If you believe Officer Parker, Detective Parker, one of the most experienced homicide investigators we have got, one who has investigated hundreds of homicide cases in his career, who has interviewed and taken statements from numerous defendants, who has testified any number of times in a court of law which led to convictions of defendants based on those statements, if you don't believe what he told you that the defendant told him, so be it. But whether or not he used a form called a waiver of rights form has absolutely nothing to do with the truth of his testimony."

The prosecutor's comments about the number of statements taken and the number of convictions obtained by Detective Parker in other cases were completely outside the record and were, accordingly, improper and objectionable. *Smith, supra; Brown, supra.* By this argument, the prosecutor sought to bolster the credibility of Detective Parker's testimony recounting the defendant's confession. As already discussed, however, Detective Parker's testimony about the confession had already been corroborated by the consistent testimony of another officer, Lisa Hamilton. Moreover, as already discussed, the trial court instructed the jury, upon a number of occasions, that the arguments of counsel did not constitute

evidence and the jurors should not consider counsel's arguments as evidence. Thus, here again, the improper argument does not warrant relief under the plain-error rule.

We find no error to reverse affecting either the jury verdict finding the defendant guilty or the jury verdict recommending the death penalty. Moreover, we agree with the Court of Criminal Appeals in its findings and its analysis regarding the propriety of the death sentence imposed by the trial court. Therefore, the judgment of the Court of Criminal Appeals is affirmed.

AFFIRMED.

HOOPER, C.J., and MADDOX, HOUSTON, COOK, SEE, LYONS, and ENGLAND, JJ., concur.

BROWN, J., recuses herself.[2]

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[2] Justice Brown was a member of the Court of Criminal Appeals when that court considered this case.

SUPREME COURT OF THE UNITED STATES

No. 00-5567
November 13, 2000

DERRICK O'NEAL MASON,
Petitioner,

—v.—

ALABAMA

Petition for writ of certiorari to the Supreme Court of Alabama denied.

[LETTERHEAD OF COURT OF CRIMINAL APPEALS
STATE OF ALABAMA]

CR-04-2394
(Death Penalty)

Derrick O'Neal Mason v. State of Alabama (Appeal from Madison Circuit Court: CC94-922.60)

ORDER

Upon consideration of the above referenced appeal, the Court of Criminal Appeals orders that said appeal be and the same is hereby DISMISSED as untimely filed. Having this date dismissed said appeal, the Court further orders that the certificate of judgment shall issue forthwith.

Done this the 8th day of September, 2005.

/s/ H.W. MCMILLAN
H.W. "BUCKY" MCMILLAN,
Presiding Judge
Court of Criminal Appeals

cc: Hon. Loyd Little, Jr., Circuit Judge
Hon. Jane Smith, Circuit Clerk
John G. Butler, Jr., Attorney
Ona T. Wang, Attorney–Pro Hac
Office of Attorney General

[LETTERHEAD OF SUPREME COURT OF ALABAMA]

August 18, 2006
1050053

Ex parte Derrick O'Neal Mason, PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Derrick O'Neal Mason v. State of Alabama) (Madison Circuit Court: CC94-922.60; Criminal Appeals: CR-04-2394).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

PARKER, J. – Nabers, C.J., and See, Lyons, Harwood, Woodall, Stuart, Smith, and Bolin, JJ., concur.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 18th day of August, 2006

/s/ ROBERT G. ESDALE, SR.
Clerk, Supreme Court of Alabama

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Case: 5:05-CV-01932-VEH-PWG

DERRICK O'NEAL MASON,
Petitioner,

—vs.—

DONAL CAMPBELL, Commissioner,
Alabama Dept. of Corrections,
Respondent.

ORDER

Petitioner Derrick O'Neal Mason, a convicted state prisoner under a sentence of death, has filed a Notice of Appeal from the denial of his 28 U.S.C. § 2254 petition for writ of habeas corpus and denial of his motion to alter or amend the judgment. (Docs. 38, 39 and 41, respectively). Before the court is petitioner's Application for Certificate of Appealability (or "ACOA"), filed on April 24, 2009, pursuant to 28 U.S.C. § 2253 and Fed. R. App. Proc. 22. (Doc. 43).

As amended in April 1996, 28 U.S.C. § 2253(c)(1)(A) requires a "circuit justice or judge" to issue a certificate of appealability in order to allow an appeal to be taken from a final order denying relief in a habeas corpus proceeding where the challenged detention "arises out of process issued by a State court." A certificate of appealability may issue where the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In addition, in the case of a petition with multiple claims for relief, "the certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by [§ 2253(c)(2)]." 28 U.S.C. § 2253(c)(3).

Petitioner contends he has made a substantial showing that his constitutional rights were violated with regard to the following issues. He argues that reasonable jurists could debate:

II. whether petitioner's Sixth Amendment rights were violated.

III. whether the prosecutors engaged in misconduct sufficient to warrant habeas relief.

IV. whether petitioner's right to a fair trial was violated when prosecutors failed to disclose information about the witness/accomplice's involvement in the crime.

V. whether the evidence was sufficient to support the "especially heinous, atrocious or cruel" aggravator.

VI. whether the trial court's erroneous instruction on aggravators and mitiga-

tors caused an incorrect finding of the 'especially heinous, atrocious or cruel" aggravator.

VII. whether petitioner's trial counsel was objectively deficient and he was prejudiced thereby, thus establishing constitutional ineffectiveness.

VIII. whether the prosecution's use of peremptory challenges violated *Batson v. Kentucky*.

IX. that the trial court erred in admitting into evidence the highly prejudicial testimony of Mr. Kilbourn regarding hair samples.

X. that petitioner's arrest for third degree assault was a pretext for police to interrogate petitioner about Ms. Cagle's homicide.

XI. whether petitioner's custodial statements should have been suppressed because they were obtained in violation of *Miranda v. Arizona* and were coerced.

XII. that the inventory search of petitioner's car was constitutionally defective.

XIII. that the district court failed to discharge its responsibility under 28 U.S.C. § 2254(D)(1) to be an independent arbiter of federal law.

XIV. whether the district court incorrectly applied Eleventh Circuit law to find petitioner's claims procedurally barred.

XV. whether petitioner is entitled to an evidentiary hearing.

XVI. whether due process and fundamental fairness require the issuance of a certificate of appealability.

The court has reviewed the arguments in support of each of the foregoing claims. (Doc. 43 at 2-53). After careful consideration of petitioner's application and review of the Memorandum Opinion, Final Judgment and Denial of the Motion to Alter or Amend the judgment pursuant to the standards enunciated by § 2253(c)(2), a certificate of appealability (doc. 43) is due to be and is hereby **DENIED**.

Petitioner is **ADVISED** that he may file a request for certificate of appealability directly with the Court of Appeals for the Eleventh Circuit.

DONE and **ORDERED** this the 14th day of May, 2009.

/s/ VE HOPKINS
VIRGINIA EMERSON HOPKINS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Case no. 5:05-CV-01932-VEH-PWG

DERRICK O'NEAL MASON,
Petitioner,

—vs.—

DONAL CAMPBELL, Commissioner
Alabama Dept. of Corrections,
Respondent.

ORDER

In accordance with the Memorandum of Opinion entered contemporaneously herewith and Rule 58 of the Federal Rules of Civil Procedure, it is hereby **ORDERED, ADJUDGED,** and **DECREED**:

1. The petition for writ of habeas corpus is **DISMISSED**;

2. The petitioner's requests for an evidentiary hearing and discovery are **DENIED**;

3. The petition is **DISMISSED WITH PREJUDICE**; and

4. Costs of this action are **TAXED** against the petitioner and in favor of the respondent.

DONE this the 3rd day of March, 2009.

/s/ VE HOPKINS
VIRGINIA EMERSON HOPKINS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

No. 5:05-CV-1932-VEH-PWG

March 3, 2009

DERRICK O'NEAL MASON,

Petitioner,

—v.—

DONAL CAMPBELL, Commissioner,
Alabama Dept of Corrections,

Respondent.

MEMORANDUM OPINION

This action seeks habeas corpus relief with respect to petitioner Derrick O'Neal Mason's ("Mason") state court conviction and death sentence on a charge of capital murder. (*See* 28 U.S.C. § 2254).

I. THE OFFENSE

The following summary of the evidence relevant to the offense is taken from opinion of Alabama Court of Criminal Appeals on direct appeal. *Mason v. State*, 768 So.2d 981, 983-87 (Ala. Crim. App. 1993).

> At the time of her death, 25-year-old Angela Cagle was working as a clerk in a Majik Mart convenience store in Huntsville. Around 2:30 a.m. on Sunday, March 27, 1994, Don Teal, a newspaper delivery man, entered the south door of the Majik Mart to deliver a stack of newspapers. He spoke briefly with Angela Cagle and a customer who was in the store.
>
> Around 3:30 a.m., DeAnna Lechman stopped by a nearby Circle K convenience store to purchase some cigarettes. Circle K did not have the brand that Lechman wanted, so she went to the Majik Mart. Lechman entered through the north door of the store because the south door was locked. As she entered the store, she noticed a sign on the door that read, "This door locked. Use other door." (R. 825.) Lechman did not see anyone in the store, so she assumed that the clerk was in the back. She called out for the clerk. When Lechman approached the back of the store, she observed the partially nude body of Angela Cagle, lying in the storeroom.

Lechman went to the counter and telephoned for help. While she was talking with the police dispatcher, she noticed that the "gas pump machine" was beeping and that it reflected an amount of $5.00 in the display. The cash register was also emitting a continuous tone. In order to hear the dispatcher, Lechman turned off the gas pump machine. She tried unsuccessfully to turn off the cash register.

Within a few minutes, the police arrived at the scene. Paul Hatfield, a patrol officer with the Huntsville Police Department, was one of the first officers to arrive. When Hatfield entered the storeroom, he found the partially nude body of Angela Cagle-she was wearing only her socks-lying across a desk. Cagle was lying on her left side, and she appeared to have suffered a gunshot wound to the right side of her face. Cagle had no visible signs of life.

Cagle's clothing was found near the desk. A bullet was recovered from the west wall in the area above Cagle's hips. A second bullet was found on some shelves located directly north of the victim's head. A shell casing was discovered in the book-shelves, and another casing was found on the floor in the area near Cagle's body. When the coroner removed Cagle's body, a second bullet wound was found on the victim's left cheek. Black buttons were found in the area near

Cagle's body. Another button was later found stuck to the victim's chest. A negroid pubic hair, consistent with a known pubic hair from the appellant, was found in the combings from Cagle's pubic hair. In addition, cloth fibers that did not match Cagle's clothing were found on her left inner thigh and calf.

Susan Marcum, who was at that time the manager of the Majik Mart, had spoken with Angela Cagle several times by telephone that night, the last time being around 2:00 a.m. Marcum was summoned to the store around 4:00 a.m. She was able to determine that the last sale occurred at 2:58 a.m., and that no money was missing from the store and that no gasoline had been stolen. Marcum testified that the only way to make the cash register emit the tone heard at the scene was to hit an incorrect button on the register.

Harry Renfroe, Jr., a homicide investigator with the Huntsville Police Department, assisted in the investigation. On March 28, 1994, he was contacted by Dewey Miller, the police officer who was securing the crime scene. Miller informed Renfroe that a black male had approached him at the scene and had asked what type of gun was involved in the incident. Miller told the individual that he did not know. The individual told Miller where he could be reached. Miller conveyed this information to Renfroe. When Renfroe tele-

phoned the individual, the man asked Renfroe what type of weapon was used in the incident. Renfroe asked the individual what type of weapon he was interested in and the man replied a ".380." (R. 1154.) The individual declined to meet with Renfroe that day. When the man telephoned Renfroe the next day, Renfroe asked him what type of .380 had been used in the shooting. The individual indicated that he was not sure. At that time, Renfroe was aware that forensic tests performed on the bullets recovered from the scene indicated that the weapon used was most likely a Davis .380. The man subsequently telephoned Renfroe and told him that the weapon was a Davis .380.

Renfroe agreed to meet with the individual at a local fast-food restaurant that afternoon. During their meeting, the man gave Renfroe the appellant's name. When Renfroe asked the individual why he thought the appellant was involved, the individual replied that the appellant had a .380 pistol and that the appellant was trying to make a name for himself. He told Renfroe that the appellant "was out of control." (R. 1157.) Renfroe returned to his office and informed the other investigators of the information that he had received. The investigators were able to obtain a physical description of the appellant, his address, and a description of his vehicle.[FN1] Renfroe subsequently spoke

with the individual who had furnished him the appellant's name, and the man said that the appellant would most likely be at a certain apartment complex that afternoon or later that evening. A "be-on-the-lookout" was issued for the appellant.

> FN 1. Testimony elicited in the suppression hearing indicated that the officers discovered that there was an outstanding warrant for the appellant's arrest for third-degree assault. This information was not provided to the jury.

That night, James Goings, a member of the Huntsville Police Department special response team, and another officer spotted the appellant's vehicle. Goings stopped the appellant's vehicle after it entered the drive-through lane of a fast-food restaurant. Two officers in another vehicle followed Goings's vehicle into the parking lot. The appellant cooperated with the officers when he was ordered out of the vehicle and placed under arrest. The appellant was subsequently transported to the criminal investigation division of the police department (CID).

Lisa Hamilton, an evidence technician with the Huntsville Police Department, assisted by Officer Dwight Hasty, performed an inventory search of the appellant's vehicle. A Davis .380 pistol, which was wrapped in a shirt, and a clip con-

taining five rounds of ammunition were found in the appellant's vehicle.

That night, Hamilton transported the weapon and the clip to Brent Wheeler, a firearms expert with the Alabama Department of Forensic Sciences. Ballistics tests indicated that the bullets found at the crime scene had been fired through the weapon recovered from the appellant's vehicle.

Harry Renfroe, one of the investigators, first spoke with the appellant when the appellant was brought into the interview room at CID on the night of March 29, 1994. After being apprised of his rights, the appellant waived his rights and talked with Renfroe. In response to Renfroe's questions, the appellant admitted that he had a Davis .380 weapon in his truck. He told Renfroe that he had borrowed the weapon the previous Thursday from an individual named "Barrington." The appellant told Renfroe that the gun had not been out of his possession since that time, and that it had been fired twice. When Renfroe inquired about the appellant's whereabouts on the night of the murder, the appellant told him that he had fallen asleep on the couch at his girlfriend's apartment, while watching television. During the course of the interview, Renfroe was informed that ballistics tests indicated that the gun found in the appellant's truck was the murder weapon.

When Renfroe confronted the appellant with this fact, the appellant continued to deny any involvement in the murder. Renfroe left the interview room.

The appellant subsequently asked everyone but James (Bud) Parker, an investigator with the Huntsville Police Department, to leave the room, and then he confessed to Parker that he killed Angela Cagle. Parker testified as follows regarding the statement:

> "I identified myself, and at 016 hours on 3/30/94 I advised him of his rights. He said he understood and would tell me what happened.
>
> "I first asked him if his name was Derrick O'Neal Mason, date of birth 8/9/74. He said, 'Yes, sir.' I asked him if he shot the victim. He said, 'Yes sir.' I asked him why he went into the store. And he said, 'To rob it.' I asked him why he shot the victim. He said, 'I just did it. It just happened.' I asked him what time he went into the store. He said, 'It was late.'
>
> "During the course of the interview the suspect stated he went in the door on the side near the Circle K, which would have been the south door. The victim was from behind-from behind the counter working on a shelf with the merchandise. He had the gun out and was trying to

cover his face with his arm. He told her to lock the door, which she did. And she took the key over to the other door and left it in the key hole. He told her to unlock the cash register and to give him the money. She said she could not until the next transaction. He told her to go to the back and to unplug the camera. She went to the back and he went behind her. He kept telling her to unplug the camera, and she said there was no camera in the store. He then said, 'I did not want to go back out front with the camera on.' He said, 'She kept saying there was no camera in the store.' He did not believe her because he thought all stores had cameras. He told her, 'If you don't unplug the camera, I will be forced to shoot you,' he said. 'I had put a bullet in the chamber earlier and was just going to shoot.' He said, 'I had the safety on.' I asked him if the clip was in the gun, and he said, 'Yes.' I asked him if it was loaded, and he said, 'Yes.' He then said, 'I thought I was going to get carjacked earlier.' He then said, 'I kept telling her to unplug the camera, and she kept saying they did not have a camera, and I did not believe her.' She said, 'Let me go get you the money,' and I thought she was going to push some button. The

victim started walking and he grabbed her by the shoulder and her jacket and shirt ripped. He heard the buttons fly off.

"He then said, 'I saw her private area.' He said, 'She was crying and I got real nervous.' He then told her, 'If you don't unplug the camera, I will make you take all your clothes off.' He looked outside to see if any car had stopped for gas. He told her to take all her clothes off, which she did. He told her, 'Now unplug the camera and show me how to open the cash register.'

"He then said, 'I was high.' I asked him what he was on. He said, 'Marijuana.' He then said he heard what he thought was a car. He said, 'She was sort of standing in the floor in front of the desk and she came at me.' He again said, 'I was high and the gun went off and I shot her.' He said, 'It scared me. . . .' He then said, 'I looked and saw her leg move and I did not want her to identify me.' He said, 'I turned my head and put the gun down there and shot her the second time.'

"I asked him how far away he was when he shot her, and he said, 'About from me to you,' which was three to four feet. I asked him if he aimed the gun for her face, and he

said, 'I just saw her shoulder. I thought I shot her in the chest.' I asked him why he shot her the second time, and he said, 'I did not want her to identify me; I just did it.'

"I then asked him where he went after the shooting. He said, 'I went up the street to the Executive Lodge and parked for about 10 minutes and tried to think, to cope with what I had done.' I asked him what he took out of the store, and he said, 'Nothing.' I asked him which door he went out as he was leaving the store. He said, 'The other door,' which would have been the north door. I then asked him if he raped the victim, and he said, 'No.' I asked him if he touched her in any way with his hands. He said, 'Nothing sexually.' I asked him where he went when he left the Executive Lodge Apartments, and he said, 'I went home and then went to my girlfriend's.'

"I asked him if his girlfriend knew what happened, and he said, 'No.' I asked him if anyone knew, and he said, 'I tried to tell my brother to get it off my chest, but I did not.' I asked him who owned the gun, and he said, 'Barrington.' I asked him if anyone else was with him, and he

said, 'No.' I asked him how long he stayed in the store, and he said, 'About 10 minutes.'

"I then asked him why he did that. He said, 'I was robbing the store to get the money to open a barber shop.' I then asked him how he was dressed that night. He said, 'The jeans and shoes that I have on and a purple shirt, which is at my girlfriend's house.' I then asked him if he knew the victim. He said, 'I have never seen her before.' I then asked him if she was sitting up on the desk when the first shot was fired, and he said, 'Her feet-her feet [were] on the floor,' and he thought she was going to come at him. He said he shot and thought he hit her in the chest. He then said, 'Fuck, if she lives, that will be a witness. I held the gun over her and pulled the trigger, turning my head.'

"I asked him what he was driving that night, and he said his mother's blue Oldsmobile and had it parked at Warren House Apartments and had walked to the store. I then asked him if he pumped some gas in his car before he shot the victim, and he then said, 'I did get $2 in gas about 30 minutes before it happened.' I asked him if he got it at that store, and he said, 'Yes. I just

rode around.' I then told him to tell me the truth and asked if he pumped $5 in gas from the north pump, and he said, 'No.'

"I then asked him how he knew the victim was by herself. He said, 'I parked at Warren House behind the Circle K, I walked down the hill behind the store, I looked inside from up on the hill, I then went back and got my car and pulled out on Sparkman and turned into the parking lot on the north side of the building.' I again asked if he parked at the gas pumps, and he said, 'No, I parked at the door which was locked.' I asked him if he had anything else he wanted to tell me, and he said, 'No, I can't think of anything else.'

". . . .

". . . I then told him there was one other thing I needed to know, and I asked him if he tried to open the cash register. And he said, 'Yes, I pushed some buttons and it started beeping and I went out the door.'"

(R. 1250-56.)

Barrington Loyd Dames, a student at Oakwood College at the time of the murder, testified that he was an acquaintance of the appellant's. Dames loaned the Davis .380 pistol to the appellant on two

occasions. He first loaned the appellant the gun approximately a week and a half before the murder. The appellant returned the gun to Dames two days later. Dames again loaned the appellant the pistol on the Thursday before Angela Cagle was murdered. Dames saw the appellant approximately two days after Cagle was murdered. The appellant told Dames that he still had the gun. The appellant did not return the gun to Dames.

Dr. Joseph Embry, a forensic pathologist for the Alabama Department of Forensic Sciences, performed the autopsy on Angela Cagle. He testified that the victim had several bruises on her body. Embry testified that the bruises to Cagle's left thigh, right knee, left arm, and buttocks appeared to be recent. Embry testified that Cagle had two bruises on her head, which appeared to have been inflicted by the same instrument. Dr. Embry testified that the victim had suffered two gunshot wounds to her head. The gunshot wound to the right side of Cagle's head passed through her brain stem, killing her instantly.

Mason v. State, 768 So.2d 981, 983-87 (Ala. Crim. App. 1998).

II. PROCEDURAL HISTORY

On June 16, 1995, Mason was found guilty of capital murder during the course of a robbery or

an attempt thereof, in violation of § 13A-5-40 (a)(2), *Code of Alabama*, 1975. A penalty hearing immediately followed and the jury, by a vote of 10-2, recommended that he be sentenced to death.

A formal sentencing hearing as required by Alabama Code § 13A-5-47 (1975) was conducted, and on August 14, 1995, the trial court judge sentenced Mason to death. An automatic notice of appeal was filed the same day.

On August 23, 1995, Mason's trial counsel, Randy and Jackie Ferguson, filed a motion to withdraw. (C.R. Vol. 1, Tab. 1 at 265-66). The motion was granted, whereupon attorneys Reid Webster and Bruce Gardner were appointed to represent Mason. (*Id.* at 267). On November 2, 1995, Webster and Gardner timely[1] filed a motion to set aside the verdict and motion for new trial. (C.R. Vol. 11 at 1-3). In it, counsel raised several substantive and ineffective assistance of trial counsel claims. (*Id.*). The motion was set for hearing on February 9, 1996. (*Id.*, Tab. 33 at 1-63). At the motion for new trial, Mason's counsel presented no witnesses, and matters were argued from the record. (*Id.*). On February 20, 1996, the trial court entered an order in which it asserted that it had

> carefully considered the Motion, and all grounds asserted therein, arguments of counsel, and the transcript of all prior proceedings (which, at the request of the

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[1] Additional time to file the motion was requested and granted due to counsels' need to obtain and review transcripts of the trial court proceedings.

> Defendant, is hereby incorporated by reference in its entirety as an exhibit to this hearing.)
>
> The Court has also reviewed again, and considered, all Motions filed and or made by the Defendant in pre-trial and trial proceedings, including any Motions for a mistrial, which were denied by the Court, and which were renewed at this hearing. The Court hereby again DENIES those Motions.
>
> After review and consideration of the above, the Court is of the opinion that the Defendant's Motion For a New Trial should be, and the same is hereby DENIED.

(*Id.*).

Mason appealed his conviction and sentence to the Alabama Court of Criminal Appeals. Mason raised nine (9) issues on direct appeal. (C.R. Vol. 12, Tab. 34 at 3-4). On March 6, 1998, the appellate court entered a published opinion affirming Mason's conviction and death sentence. *See Mason v. State*, 768 So.2d 981 (Ala. Crim. App. 1998).

The Supreme Court of Alabama affirmed the conviction and sentence on April 7, 2000, finding no reversible error, plain or otherwise. *See Ex Parte Mason*, 768 So.2d 1008 (Ala. 2000).

The United States Supreme Court denied Mason's petition for writ of *certiorari* on November 13, 2000. *See Mason v. Alabama*, 531 U.S. 994 (2000).

Mason then filed a petition for relief from judgment pursuant to Rule 32 of the ALABAMA RULES

OF CRIMINAL PROCEDURE [ALA.R.CRIM.P.] on October17, 2001. (Rule 32 C.R. Vol. 12, Tab. 41 at 1-34). The State filed an answer and supporting brief. (*Id.*, Tab. 42 at 1-60 and Tab. 43 at 1-10). Mason responded to the State's answer. (*Id.*, Tab. 44 at 1-8).

The circuit court again denied the Rule 32 petition on July 7, 2005.[2] (Rule 32 C.R. Vol. 16, Tab. 55 at 1-64). Pursuant to ALA. R. CRIM. P. 32.10, Mason could "appeal the decision of a circuit court according the procedures of the Alabama Rules of Appellate Procedure to the Court of Criminal Appeals upon taking a timely appeal as provided in Rule 4, Alabama Rules of Appellate Procedure [ARAP]." Rule 4(a) of the ARAP instructs that the notice of appeal "shall be filed with the clerk of court be taken within 42 days (6 weeks) of the date of entry of judgment or order appealed from[.]" Thus, Mason was required to filed a notice of appeal from the denial of the Rule 32 petition on or before August 18, 2005. However, Mason did not file the notice of appeal until August 22, 2005. (Rule 32 C.R. Vol. 15, Tab. 46).

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[2] Actually, the circuit court denied the petition on August 6, 2004, but due to clerical error, the parties were not informed of the dismissal until April 25, 2005. *See* (Rule 32 C.R Vol 15, Tab 45, Exhibits A & B) At the circuit court's suggestion, Mason filed a petition for Writ of Mandamus requesting permission to file an out of time appeal *Id* at Tab. 45, pp 1-7. The State stipulated to the facts underlying Mason's petition for writ of mandamus. *Id* at Tab 46 On June 29, 2005, the Alabama Court of Criminal Appeals granted the writ, directed the circuit judge to set aside its order dismissing the Rule 32 petition, reissue the order and notify Mason so that a timely appeal could be filed. *See* (Rule 32 C.R. Vol 16, Tab. 54)

On September 8, 2005, the Alabama Court of Criminal Appeals dismissed Mason's appeal as untimely filed. *Mason v. State*, Memorandum Opinion, CR-04-2394, ___ So.2d ___ (Ala. Crim. App. 2005). (*Id.* at Vol. 16, Tab. 56).

The Supreme Court of Alabama denied certiorari review on August 8, 2005.

On September 13, 2005, Mason filed the present Habeas Petition (the "Petition") in this court.

III. THE SCOPE OF FEDERAL HABEAS REVIEW

Pursuant to 28 U.S.C. § 2254(a), a federal district court is prohibited from entertaining a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court . . ." unless the petitioner alleges "he is in custody in violation of the Constitution or laws or treaties of the United States." In other words, this court's review of habeas claims is limited to federal constitutional questions. Claims pertaining solely to questions of state law fall outside the parameters of this court's authority to provide relief under § 2254. Thus, unless otherwise expressly stated, use of the word 'claim' in this opinion presupposes a claim of federal constitutional proportion.

A. Exhaustion and Procedural Default

Prior to seeking relief in federal court from a state court conviction and sentence, a habeas petitioner is first required to present his federal claims to the state court by exhausting all of the state's available procedures. The purpose of this

requirement is to ensure that state courts are afforded the first opportunity to correct federal questions affecting the validity of state court convictions. As explained by the Eleventh Circuit:

> In general, a federal court may not grant habeas corpus relief to a state prisoner who has not exhausted his available state remedies. 28 U.S.C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State. . . ."). "When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction. . . . The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Smith v. Newsome*, 876 F.2d 1461, 1463 (11th Cir. 1989) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887(1983)).
>
> Exhaustion of state remedies requires that the state prisoner "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (citing *Picard v. Connor*, 404 U.S. 270, 275-76 (1971) (internal quotation marks omitted).

The Supreme Court has written these words:

> [T]hat the federal claim must be fairly presented to the state courts . . . . it is not sufficient merely that the federal habeas applicant has been through the state courts. . . . Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies.

Picard, 404 U.S. at 275, 92 S.Ct. at 512. *See also Duncan*, 513 U.S. at 365, 115 S.Ct. at 888 ("Respondent did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment.").

Thus, to exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues. "It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 5-6, 103 S.Ct. 276, 277, 74 L.Ed.2d 3 (1982) (citations omitted).

Snowden v. Singletary, 135 F.3d 732, 735 (11th Cir. 1998).

Moreover, if a petitioner fails to raise his federal claim to the state court at the time and in the manner dictated by the state's procedural rules, the state court can decide the claim is not entitled to a review on the merits, *i.e.*, the claim is procedurally defaulted. Usually, if the last state court to examine a claim explicitly finds that the claim is defaulted because the petitioner failed to follow state procedural rules, then federal review of the claim is also precluded pursuant to federal procedural default principles. As explained by the Eleventh Circuit:

> The federal courts' authority to review state court criminal convictions pursuant to writs of habeas corpus is severely restricted when a petitioner has failed to follow applicable state procedural rules in raising a claim, that is, where the claim is procedurally defaulted. Federal review of a petitioner's claim is barred by the procedural default doctrine if the last state court to review the claim states clearly and expressly that its judgment rests on a procedural bar, *Harris v. Reed*, 489 U.S. 255, 263, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989), and that bar provides an adequate and independent state ground for denying relief. *See id.* at 262, 109 S.Ct. at 1042-43; *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 1987, 100 L.Ed.2d 575 (1988). The doctrine serves to ensure petitioners will first seek relief in accordance with state procedures, *see Presnell v. Kemp*, 835 F.2d 1567, 1578-79 (11th Cir. 1988), *cert.*

> *denied*, 488 U.S. 1050, 109 S.Ct. 882, 102 L.Ed.2d 1004 (1989), and to "lessen the injury to a State that results through reexamination of a state conviction on a ground that a State did not have the opportunity to address at a prior, appropriate time." *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991).

Johnson v. Singletary, 938 F.2d 1166, 1173 (11th Cir. 1991). Federal deference to a state court's clear finding of procedural default under its own rules is so strong that a:

> "state court need not fear reaching the merits of a federal claim in an *alternative* holding. Through its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law." *Harris*, 489 U.S. at 264 n. 10, 109 S.Ct. 1038 (emphasis in original). *See also Alderman v. Zant*, 22 F.3d 1541, 1549-51 (11th Cir. (where a Georgia habeas corpus court found that the petitioner's claims were procedurally barred as successive, but also noted that the claims lack merit based on the evidence, "this ruling in the alternative did not have an effect . . . of blurring the clear determination by the [Georgia habeas corpus] court that the allegations was procedurally barred"),

cert. denied, 513 U.S. 1061, 115 S.Ct. 673, 130 L.Ed.2d 606 (1994).

Bailey v. Nagle, 172 F.3d 1299, 1305 (11th Cir. 1999).

The Supreme Court defines an "adequate and independent" state court decision as one "'[which] rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.'" *Lee v. Kemna*, 534 U.S. 362, 375 (U.S. 2002) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (emphases added)). Whether or not a state procedural rule is "adequate and independent" so as to have a preclusive effect on federal review of a claim "'is itself a federal question.'" (*Id.*) (quoting *Douglas v. Alabama*, 380 U.S. 415, 422 (1965).

A state procedural rule is "independent of the federal question" when it "rests solidly on state law grounds [that are] not intertwined with an interpretation of federal law." *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001) (quoting *Card v. Dugger*, 911 F.2d 1494, 1516 (11th Cir. 1990)). To be considered "adequate" by a federal court, the state procedural rule must be both "'firmly established and regularly followed.'" *Lee v. Kemna*, 534 U.S. at 375 (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984). In other words, the rule must be "clear [and] closely hewn to" by the state for a federal court to find it to be adequate. *James v. Kentucky*, 466 U.S. at 345. This does not mean that the procedural rule must be applied rigidly in every instance, or that occasional failure to do so eliminates its "adequacy." Rather, the "adequacy" requirement means only that the procedural rule "must not be applied in an arbitrary or unprece-

dented fashion." *Judd v. Haley*, 250 F.3d at 1313. If it is adequate, then the federal court normally will foreclose its review. If however, the rule is not firmly established, or if it is applied in an arbitrary, unprecedented, and manifestly unfair fashion, it is not adequate to preclude federal review. *Card v. Dugger*, 911 F.2d at 1517.

Of course, there are also instances where the doctrines of procedural default and exhaustion intertwine. For instance, if a petitioner's federal claim is unexhausted, the district court will traditionally dismiss it without prejudice or stay the cause of action in order to allow the petitioner to first avail himself of his state remedies. However, "if it is clear from state law that any future attempts at exhaustion [in state court] would be futile [under the state's own procedural rules,]" this court can simply find that the claim is "procedurally defaulted, even absent a state court determination to that effect[.]" *Bailey v. Nagle*, 172 F.3d 1299, 1305 (11th Cir. 1999) (citing *Picard v. Connor*, 404 U.S 270, 276 (1971) and *Snowden v. Singletary*, 135 F.3d 732, 737 (11th Cir. 1998)).

There are only three circumstances in which an otherwise valid state-law ground will not bar a federal habeas court from considering a constitutional claim that was procedurally defaulted in state court: (1) where the petitioner had good "cause" for not following the state procedural rule and was actually "prejudiced" by not having done so; (2) where the state procedural rule was not "firmly established and regularly followed"; and (3) where failure to consider the petitioner's claims will result in a "fundamental miscarriage

of justice." *See Edwards v. Carpenter*, 529 U.S. 446, 455 (2000) (Breyer, J., concurring); *see also, e.g., Coleman v. Thompson*, 501 U.S. at 749-50 (holding that a state procedural default "will bar federal habeas review of the federal claim, unless the habeas petitioner can show cause for the default and prejudice attributable thereto, or demonstrate that failure to consider the federal claim will result in a fundamental miscarriage of justice") (citations and internal quotation marks omitted); *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."); *Smith v. Murray*, 477 U.S. 527, 537 (1986) (same); *Davis v. Terry*, 465 F.3d 1249, 1252 4 (11th Cir. 2006) ("It would be considered a fundamental miscarriage of justice if 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'") (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (in turn quoting *Murray v. Carrier*, 477 U.S. at 496)).

B. The "Cause and Prejudice" Standard

As the "cause *and* prejudice" standard clearly is framed in the conjunctive, a petitioner must prove both parts. To show cause, a petitioner must prove that "some objective factor external to the defense impeded counsel's efforts" to raise the claim previously. *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

> Objective factors that constitute cause include " 'interference by officials' " that makes compliance with the State's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." *Ibid.* In addition, constitutionally "[i]neffective assistance of counsel . . . is cause." *Ibid.* Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default. *Id.*, at 486-488, 106 S. Ct., at 2644-45.

McCleskey v. Zant, 499 U.S. 467, 493-94 (1991). *See also Murray v. Carrier*, 477 U.S. at 488-89 ("Ineffective assistance of counsel . . . is cause for a procedural default."); *Reed v. Ross*, 468 U.S. 1, 16 (1984) ("[W]here a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures.").

Once cause is proved, a habeas petitioner also must prove prejudice. Such a showing must go beyond proof "that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original).

C. The "Fundamental Miscarriage of Justice" Standard

In a "rare," "extraordinary,"[3] and "narrow class of cases,"[4] a federal court may consider aprocedurally defaulted claim in the absence of a showing of "cause" for the procedural default, if (1) a "fundamental miscarriage of justice" has "probably resulted in the conviction of one who is actually innocent," *Smith v. Murray*, 477 U.S. 527, 537-38 (1986) (quoting, respectively, *Engle v. Isaac*, 456 U.S. 107, 135 (1982), and *Murray v. Carrier*, 477 U.S. at 496),[5] or if (2) the petitionershows "by clear and convincing evidence that[,] but for a constitutional error, no reasonable juror

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[3] *Schlup v Delo*, 513 U.S 298, 321 (1995) ("To ensure that the fundamental miscarriage of justice exception would remain 'rare' and would only be applied in the 'extraordinary case,' while at the same time ensuring that the exception would extend relief to those who were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence.").

[4] *McCleskey v Zant*, 499 U S 467, 494 (1991) ("Federal courts retain the authority to issue the writ of habeas corpus in a further, narrow class of cases despite a petitioner's failure to show cause for a procedural default These are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime We have described this class of cases as implicating a fundamental miscarriage of justice ") (citing *Murray v Carrier*, 477 U S. 478, 485 (1986))

[5] Specifically, the *Murray v. Carrier* Court observed that, "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default " 477 U S at 496

would have found the petitioner eligible for the death penalty." *Schlup v. Delo*, 513 U.S. 298, 323-27 & n.44 (1995) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)); *see also, e.g., Smith v. Murray*, 477 U.S. at 537-38.

Even when exhaustion and procedural default are not at issue, federal review of a claim that has been decided on the merits by a state court is fairly restricted.

D. Rules Governing Habeas Corpus Cases Under § 2254

1. 28 U.S.C. § 2254(d) and (e)

When it enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress significantly limited the circumstances under which a habeas petitioner may obtain relief. Indeed, under AEDPA, a petitioner is only entitled to relief on a federal claim if he shows that the state court's adjudication of his claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or that the court's rulings "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (2). *See also Williams v. Taylor*, 529 U.S. 362, 404 (2000); *Brown v. Payton*, 544 U.S. 133 (2005); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001). "Moreover, a state court's factual determinations are presumed correct unless rebutted by clear and convincing evidence." *McNair v.*

Campbell, 416 F.3d 1291, 1297 (11th Cir. 2005) (citing 28 U.S.C. § 2254(e)(1)).

A state court's adjudication of a claim will be sustained under § 2254(d)(1) unless it is "contrary to" clearly established, controlling Supreme Court precedent, or it is an "unreasonable application" of that law. These are two different inquiries, not to be confused or conflated, as the Supreme Court explained in *Williams v. Taylor*, 529 U.S. 362 (2000), saying:

> Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "*contrary to* . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "*involved an unreasonable application of* . . . clearly established Federal law, as determined by the Supreme Court of the United States." (Emphases added.)

Williams, 529 U.S. at 404. The statute limits the source from which "clearly established Federal law" can be drawn to "holdings, as opposed to the dicta, of the [Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412; *see Jones v. Jamrog*, 414 F.3d 585 (6th Cir. 2005); *Sevencan v. Herbert*, 342 F.3d 69 (2nd Cir. 2003); *Warren v. Kyler*, 422 F.3d 132, 138 (3rd Cir. 2005) ("[W]e do not consider those holdings as they exist today, but rather as they existed as of

the time of the relevant state-court decision.") (internal quotation marks and citation omitted).

A state-court determination can be "contrary to" clearly established Supreme Court precedent in either of two ways:

> First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.

Williams v. Taylor, 529 U.S. 362, 405 (2000).

Likewise, a state-court determination can be an "unreasonable application" of clearly established Supreme Court precedent in either of two ways:

> First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

(*Id.* at 407); *see also Putman v. Head*, 268 F.3d 1223 (11th Cir. 2001)). Whether a particular application of Supreme Court precedent is "reasonable" turns not on subjective factors, but on whether the application of Supreme Court precedent at issue was "objectively unreasonable." The question is not whether the state court "correctly" decided the issue, but whether its determination was "reasonable," *even if incorrect. See Bell v. Cone*, 535 U.S. 685, 694 (2002).

Having explained the scope of this court's authority to review state court decisions, it is now appropriate to examine the federal procedural rules applicable to the controversy presently before the court.

2. Procedural Rules Governing Habeas Corpus Cases Under § 2254

Since "habeas corpus review exists only to review errors of constitutional dimension," a habeas corpus petition must meet the "heightened pleading requirements [of] 28 U.S.C. § 2254 Rule 2c." *McFarland v. Scott*, 512 U.S. 849, 856 (1994) (other citations omitted). A petitioner must specify all grounds for relief available to him, state the facts supporting each ground, and state the relief requested. 28 U.S.C. § 2254, Rule 2(c)(1)(2)(3) of the *Rules Governing Section 2254 Cases*. A "general reference to the transcripts, case records and briefs on appeal patently fails to comply with Rule 2(c)." *Phillips v. Dormire*, 2006 WL 744387, *1, No. 4:04CV1483 (E.D. Mo. 2006) (citing *Adams v. Armontrout*, 897 F.2d 332, 333 (8th Cir. 1990).

The burden of proof is on the habeas petitioner to establish a factual basis for the relief he seeks.

Hill v. Linahan, 697 F.2d 1032, 1034 (11th Cir. 1983); *Corn v. Zant*, 708 F.2d 549, *reh'g denied*, 714 F.2d 159 (11th Cir. 1983). Consequently, a petitioner must provide substantial evidence to meet his burden of proof to show why federal post-conviction relief should be awarded. *Douglas v. Wainwright*, 714 F.2d 1532, *reh'g denied*, 719 F.2d 406 (11th Cir. 1983), *vacated on other grounds*, 468 U.S. 1206 (1984) and 468 U.S. 1212 (1984), *on remand* 739 F.2d 531 (11th Cir. 1984). That burden is to demonstrate at least *prima facie* evidence establishing the alleged constitutional violation. The mere assertion of a ground for relief, without more factual detail, does not satisfy petitioner's burden of proof or the requirements of 28 U.S.C. § 2254(e)(2) and Rule 2(c), *Rules Governing § 2254 Cases in the United States District Courts*.

With these principles in mind, the court now turns to Mason's claims.

IV. THE CLAIMS

A. The prosecution's failure to develop and disclose information about the witness/accomplice's involvement in the crime violated petitioner's right to a fair trial. (Doc. 17, ¶¶ 26-41 at 12-18). *Brady v. Maryland*, 373 U.S. 83, 86 (1963) and *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995).

In his petition, Mason alleges that the prosecution violated his constitutional right to a fundamentally fair trial by failing to investigate, discover and disclose to the defense that a wit-

ness/accomplice (who Mason identifies as Quincy) actually "planned the crime, persuaded [petitioner] to commit it, and provided [petitioner] hallucinatory drugs without [his] knowledge or consent just before [petitioner] committed the crime, resulting in [his] involuntary intoxication." (Doc. 17 at 16-17).[6] Moreover, Mason claims the prosecution failed to disclose that Quincy was given a financial reward. (*Id.* at 17-18). Mason asserts that had evidence of his own involuntary intoxication and of Quincy's bias and monetary interests been disclosed, he would have been acquitted of the capital offense or sentenced to life-without-parole or found guilty of a non-capital offense. (*Id.*). Mason relies on *Brady v. Maryland*, 373 U.S. 83, 86 (1963) and *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995), to support his argument that the alleged failures rendered his trial fundamentally unfair. He now seeks "discovery of prosecution and institutional files, especially in light of the fact that [he] alleges that Quincy played a key role in the crime, including planning it, giving [him] the weapon, and intoxicating [him]

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[6] He asserts that, on the night of the murder, Quincy kept paging him and, since he liked hanging out with Quincy and wanted to keep a friendship, he went to Quincy's house and smoked some marijuana Unlike other times, the marijuana made him feel strange and hallucinatory He then writes, "Then Quincy gave me a gun and dared me to rob the 'Majik Mart' convenience store " He then says he gave Quincy the gun back the night of the incident but that, on March 29, 1994, Quincy told him to come get the gun and get rid of it He picked it up and went to a fast food restaurant, where he was arrested in his car and the gun seized by police. He asserts he looked across the street and saw Quincy and his friends, but just thought it was coincidence at the time

without his knowledge or consent[.]" (Doc. 17 at 75).

This claim was raised for the first time in Mason's Rule 32 petition[7] and reads:

> The state elicited testimony from its witnesses and introduced evidence in violation of Mr. Mason's constitutional rights. The state's improprieties included, but are not limited to:
>
> . . . .
>
> . . . .
>
> (c) Abdicating its duty to learn of any favorable evidence known to the police or others acting on the government's behalf, including information relating to the informant's role in the crime and the informant's possible bias[.][8]

The Rule 32 court summarily dismissed the claim, holding "these allegations are procedurally barred from review because they were raised or addressed at trial, could have been but were not raised at trial, were raised or addressed on appeal, or could have been but were not raised on appeal. Rules 32.2(a)(2),(3),(4), and (5) ARCrP. Therefore, these allegations are summarily dismissed."[9] Mason's appeal from the rejection of the

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[7] (Rule 32 C R Vol 14, Tab 41 at 22)

[8] (*Id.*) At this juncture, Mason inserted footnote 2, which reads *See e.g., Kyles v Whitley*, 514 U.S 419 (1994); *Florida v. J.L.*, 529 U.S. 266 (2000).

[9] (Rule 32 C R Vol 16, Tab 55 at 61).

claim was dismissed (by the Alabama Court of Criminal Appeals) as untimely filed.[10]

Respondent answers that this claim is procedurally defaulted because the Alabama Court of Criminal Appeals dismissed Mason's collateral appeal as untimely. (Doc. 24 at 3). Respondent additionally argues that the claim was not fairly presented in Mason's Rule 32 petition and is, therefore, unexhausted and procedurally defaulted. (*Id.* at 4-5)(citing A.R.CRIM.P. 32.2 (b) and (c)). As a final addition, respondent argues the Rule 32 court correctly dismissed the claim as procedurally defaulted because Mason could have, but failed to, present it at trial or on direct appeal. (*Id.* at 5-6).

Mason's collateral appeal was clearly untimely and the state court's application of the adequate and independent state procedural rule to determine the untimeliness of the appeal presumptively renders this claim procedurally defaulted for federal review purposes. Alternatively, and assuming without deciding that the claim was fairly presented in the Rule 32 petition, the claim is procedurally defaulted because it could have been raised at trial or on appeal. All of the alleged facts that the prosecution purportedly failed to investigate, discover, and disclose to Mason about Quincy were unquestionably known to Mason and his counsel before trial and on appeal.

Additional evidence in the trial record, the content of which is not disputed by Mason, clearly illuminates the extent of Mason's knowledge. The

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[10] *Mason v State*, Memorandum Opinion, CR-04-2394, ___ So 2d ___ (Ala. Crim. App 2005). (Rule 32 C R Vol 16, Tab. 56).

record contains an outpatient mental evaluation report dated Oct. 17, 1994, marked and admitted as Defendant's Ex. 1 at the sentencing hearing. (R. Vol. 1 at 299-304). In it, Dr. Lawrence Maier writes that Mason reported "a long history of illegal street drug (as well as alcohol) [use,] including daily use of marijuana, occasional LSD and strong marijuana ('reefer')." (*Id.* at 301). When Maier asked Mason about his drug use at the time of the crime, "he showed good recall of pre-crime drug involvement as to type and consumption, and could report with adequate clarity the apparent drug-hallucinatory activity that occurred during the crime itself." (*Id.* at 303). Mason told the doctor he consumed alcohol, LSD, "Mad Dog" and Marijuana before the offense and had never been that high before. The doctor concluded Mason was significantly intoxicated at the time of the offense. (*Id.*).

The second relevant document is the Trial Court's Exhibit A to sentencing, which is a Youthful Offender report. (R. Vol. 1 at 305-309). Again, Mason does not dispute the content of the report. The report was prepared for the Capital Murder offense and a Robbery/Attempted Murder offense. The latter offense occurred at another convenience store in Huntsville and also involved the use of a gun. (*Id.*). The offender wanted money from the cash register, the store videotape, and tried to shoot the clerk three times but the gun jammed each time. The suspect took the videotape and left. The report says "a witness" saw Mason do it and that, when Mason left the store, the witness was told to forget he saw Mason. (*Id.*). When subsequently identified by the victim, Mason confessed

to the second crime in full. He said he left the store and jumped into a truck driven by Quincy Black and Keith Byers. Both Black and Byers were questioned and denied any knowledge of Mason's intent to conduct a robbery. They stated Mason had pumped $2 worth of gas and had gone inside to pay. Black stated that he saw Mason robbing the store and tried to pull out of the station but traffic prevented him from reaching the street before Mason was able to jump into the vehicle. (*Id.*). Mason purportedly tried to give the gun to Byers, who refused to take it. Neither Black nor Byers were charged. (*Id.*). Trial counsel cross-examined law enforcement officers regarding the second robbery charge during a pre-trial suppression hearing. Although the trial court would not permit identification of the confidential informant[11] in the Capital Offense now at issue, Mason

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[11] In his petition, Mason did not raise a constitutional claim attacking the trial court's failure to disclose Quincy Black's identity In his reply brief, Mason does assert that the trial court failed to apply the "proper standard" to deny disclosure because it relied solely on the prosecutor's assertion that the information regarding Black did not exist (because they allegedly did not investigate him) and because Black had "fear " (Doc 35 at 17) The appellate court relied, in part, on *Roviaro v. United States*, 353 U S 53 (1957) to affirm that the trial court's decision was not an abuse of discretion *Mason v State*, 768 So 981, 1001-02 (Ala. Crim App 1998)

Further in-depth discussion is unnecessary, however, because, even if the prosecution had been directed to disclose Black's identity, Mason's assertion that "he would have benefitted greatly . . . as he would have been able to compel Quincy [Black] to appear and submit to cross-examination despite his wish to 'remain confidential'" lacks substance (*Id* at 18) In light of the information obviously already

was well aware of the dynamics of the prosecutorial investigation. (R. Vol. 2 at 190-194).

Significantly, law enforcement officials admitted to Mason's lawyers during a pre-trial hearing that the informant had received a reward from Crimestoppers. (R. Vol. 3 at 265-66). Had Mason elected to pursue the "defense" he now considers imperative, he could have done so at the guilt phase of trial, and he could have testified to the alleged involuntary intoxication at the penalty phase of trial. (He did in fact testify in his own behalf at the hearing). He also could have pursued this issue on direct appeal. This claim is due to be dismissed and Mason's request for discovery is due to be denied. There is no material evidence which was in the possession of the prosecutor of which Mason was unaware which could have had an effect on the outcome of the trial or sentencing.

B. Petitioner was denied his Sixth Amendment right to confront witnesses against him. (Doc. 17, ¶¶ 42-61 at 19-28). *Crawford v. Washington,* 541 U.S. 36 (2004).

Mason alleges that the trial court violated his Sixth Amendment right to confront his accusers when it allowed Detective Renfroe to testify to four out-of-court statements made "by

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known to Mason, additional information contained in Dr Maier's Outpatient Forensic Evaluation and the Youthful Offender report, as well as Mason's confession and his own penalty phase hearing testimony, it is difficult to determine how Black's testimony would have benefitted Mason. If anything, confrontation and cross-examination of Black would have proved to be very dangerous, if not, fatal to Mason's defense

witness/informant Quincy [Black], several of which directly implicated [Mason] in the crime for which he had been convicted." (Doc. 17 at 19-20)(citing *Crawford v. Washington*, 541 U.S. at 36)(emphasis by petitioner). Mason contends that "the only issue necessary to resolve [his] Sixth Amendment claim is whether any or all of the [following] four statements were testimonial", *e.g.* "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Id.*)(quoting *Crawford*, 541 U.S. at 52)).

The statements purportedly made by Quincy [Black] are:

a. that Quincy was interested in or had information about a .380 caliber pistol used in the homicide (R. 1155) and that he knew an individual he thought was involved in the homicide who had a .380 caliber pistol (R. 1157);

b. that the murder weapon was a Davis brand gun (R. 115-56);

c. that the murderer's name was Derrick Mason (R. 1157);

d. that [Mason] was "out of control . . . trying to make a name for himself and that he was involved in this homicde." (R. 1157)

(*Id.* a 19).

Mason's trial counsel did not raise a hearsay objection to the statements during trial, as required by Alabama's contemporaneous objection rule. On direct appeal, the Alabama appellate courts conducted a plain error review limited to

answering whether the statements were indeed inadmissible hearsay. *See Mason v. State*, 768 So.2d at 1002; *Ex parte Mason*, 768 So.2d at 1011. Mason contends that the

> Alabama Court of Criminal Appeals held the trial court had not committed plain error in admitting Quincy's statements because they were admitted to explain the investigation and were therefore non-hearsay.... Although the Alabama Supreme Court upheld this finding, it expressed concern, noting that the state purpose of admitting this testimony was "dubious." *Ex Parte Mason*, 768 So.2d at1011.

(Doc. 17 at 23).[12] Mason now declares the statements were hearsay because they "were admitted to prove the truth of the matter asserted, or had that effect, notwithstanding the trial judge's ruling admitting them as 'explanatory[,]' " and such admission was not harmless error. (*Id.* at 27-28). In his reply brief, Mason contends "Quincy's unsolicited statements to police were inadmissible hearsay, and the trial court's admission of those statements through a police officer's testimony was contrary to clearly established Supreme Court case law." (Doc. 35 at 19-20) (citing *Moore v. United States*, 429 U.S. 20, 30 (1976).

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[12] In his reply brief, Mason asserts that this opinion is a finding that the statements were indeed hearsay in that they were admitted to show the proof of the matter asserted. (Doc. 25 at 26). The opinion simply does not state that the statements "were indeed hearsay "

Respondent's answer is twofold. (Doc. 24 at 8-9). First, Respondent declares that, to the extent Mason now seeks to raise a Sixth Amendment Confrontation Clause claim in his habeas petition, the claim is unexhausted and procedurally defaulted because he did not "fairly present" this specific issue to the state court in his brief on direct appeal. (Doc. 24 at 8-9) (citing *O'Sullivan v. Boerckel*, 526 U.S. [838,] 842-843 [(1999)]; *McNair v. Haley*, 416 F.3d 1291 (11th Cir. 2005)). Next, Respondent answers that to the extent Mason "is alleging . . . that Investigator Renfroe's testimony regarding the confidential informant's information constitutes inadmissible hearsay," he cannot show that the state court's adjudication of the claim was contrary to or an unreasonable application of clearly established federal law or an unreasonable interpretation of the facts in light of the evidence before it.

Issue V of Mason's brief on direct appeal[13] is captioned, "DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S REQUEST TO REVEAL THE IDENTITY OF AN ALLEGED CONFIDENTIAL INFORMANT?" (C.R. Vol. 12, Tab. 34 at 21). In the text of the Claim, Mason alleged the trial court erroneously refused "several attempts" by the defense to discover the identity of a "so-called" confidential informant, even though he filed "a motion for expanded discovery pursuant to the mandates of *Ex Parte Monk*, 557 So.2d 832 (Ala. 1989)." (*Id.*).

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[13] Mason's brief in support of his petition for writ of certiorari is identical *See* (C.R Vol. 13 at 15-16)

Mason argued that the individual was not a confidential informant in the legal sense because Detective Renfroe had "had no previous dealings with [him], and no track record of reliability." (*Id.*). Yet, Renfroe was allowed to testify to the informant's statements. In the last sentence and one-half of his brief, Mason adds that the

> informant, in effect, was allowed to testify in this case to the jury through Detective Renfroe. The informant's testimony was clearly hearsay and Mason was deprived of his Sixth Amendment right to confront the witness who accused him of this crime.

(*Id.* at 13-14).

Although Mason's description of his claim is inartful, considerable effort was expended in the text related to the inadmissibility of the hearsay statements of the informant. He also identified the Sixth Amendment and asserted that he was denied his right to confront a witness against him. If this court were to assume that Mason's claim had been fairly presented to the state court, that the state court failed to make a specific ruling concerning the Confrontation Clause claim, that the informant's statements are testimonial as established by *Crawford* and its progeny, and that the Alabama Supreme Court actually made a finding[14] that the statements were indeed hearsay such that the Confrontation Clause is implicated, Mason is not entitled to relief. Mason simply cannot establish that the state court's application of

[14] It is not sufficiently clear that the Alabama Supreme Court held that statements were hearsay.

the plain error standard to the "inadmissible hearsay" claim entitles him to habeas relief, nor can he independently show that the same facts, viewed through the Confrontation Clause, resulted in a fundamentally unfair trial.[15]

The court begins with the Alabama Supreme Court's decision regarding inadmissible hearsay. It reads:

> At trial the defendant-petitioner did not preserve for review any of the issues we will discuss. Thus, the issues will be considered under the "plain-error" rule.
>
> "'"Plain error" only arises if the error is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings.'" *Ex parte Womack*, 435 So.2d 766, 769 (Ala.1983) (quoting *United States v. Chaney*, 662 F.2d 1148, 1152 (5th Cir.1981)). *See also Ex parte Woodall*, 730 So.2d 652 (Ala.1998). "'In other words, the plain-error exception to the contemporaneous objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result."'" *Ex parte Land*, 678 So.2d 224, 232 (Ala.1996) (quoting *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (quoting *United States v. Frady*, 456 U.S. 152, 163, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982))). This Court may

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[15] This court's decision must be the same whether the Confrontation Clause claim is reviewed *de novo* or under 28 U.S.C. ¶ 2254(d)

take appropriate action when the error "has or probably has adversely affected the substantial rights of the petitioner." Rule 39(k), Ala. R.App. P. "[A] failure to object at trial, while not precluding our review, will weigh against any claim of prejudice." *Ex parte Woodall*, 730 So.2d at 657 (citing *Kuenzel v. State*, 577 So.2d 474 (Ala. Crim. App. 1990), aff'd, 577 So.2d 531 (Ala.), *cert denied*, 502 U.S. 886, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991)).

The petitioner complains that the trial court allowed the State, without objection from the defendant, to elicit testimony from the investigating officer recounting out-of-court declarations by an informant incriminating the defendant. The out-of-court declarations included an identification of the murder weapon, a description of the defendant, the name of the defendant, and a statement that the defendant was "out of control" and that he was "trying to make a name for himself and that he was involved in this homicide." The petitioner further complains that the trial court allowed the assistant prosecutor to argue, without objection by the defendant, that "you must simply take, because it has been held admissible, the information that the confidential informant provided, as a matter of law."

The informant's out-of-court declarations had been offered, without objection, for the dubious purpose of showing why

the officer conducted his investigation and expressly not for the purpose of proving the truth of the matter stated.[16] Likewise, the trial court had admitted this testimony expressly subject to these limitations. The out-of-court declarations would have been inadmissible hearsay for the truth of the matter stated. Rule 801 C; C. Gamble, *McElroy's Alabama Evidence*,

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[16] The plain error review completed by the Alabama Court of Criminal Appeals reads

> Investigator Renfroe's testimony did not constitute inadmissible hearsay because it was not offered to prove the truth of what the "tipster" told Renfroe, rather, it was offered to explain Renfroe's actions and the sequence of events following his conversation with the "tipster " See *Sawyer v. State*, 598 So 2d 1035, 1038 (Ala Cr App 1992), cert denied, 506 U.S. 943, 113 S.Ct. 386, 121 L.Ed.2d 295 (1992), and *D.R.H v. State*, 615 So.2d 1327 (Ala Cr. App 1993) Moreover, following Investigator Renfroe's testimony, the trial court thoroughly cautioned the jury that Renfroe's testimony regarding statements made to him during the course of his investigation were not offered to prove the truth of those statements, rather, the testimony was offered as an explanation of the sequence of events and to explain Renfroe's actions "[T]he trial judge's thorough limiting instruction was more than adequate to explain to the jury the purpose for which the evidence was received." *Roper v State*, 695 So.2d 244, 246 (Ala. Cr App 1996), cert denied, 695 So.2d 249 (Ala. 1997) Accordingly, we find no error in allowing Detective Renfroe to testify to the substance of his conversation with the "tipster "

Mason v. State, 768 So.2d 981, 1001-1002 (Ala Crim App 1998) (bracketed text by this court)

§ 242.01(2) (5th ed. 1996). Thus, to the extent the prosecutor's remarks can be construed as arguing out-of-court declarations for the truth of the matter stated, the argument was improper.

Neither the admission of the testimony about the informant's out-of-court declarations nor the prosecutor's argument can work a reversal, however, unless the defendant suffered enough prejudice to meet the standards of the plain-error rule. Rule 45, Ala. R.App. P. Moreover, the plain-error rule does not entitle a defendant to relief if reasonable trial tactics or strategy could account for the defendant's not interposing an objection or otherwise preserving the matter for review. *Hallford v. State*, 629 So.2d 6 (Ala. Crim. App. 1992), cert. denied, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 491 (1994); *Luke v. State*, 484 So.2d 531 (Ala. Crim. App.1985). We judge the reasonableness of such tactics or strategy from the circumstances as they would have been perceived by the defense at the time for preserving error rather than at a later time in hindsight. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 LED.2d 674 (1984); *Duren v. State*, 590 So.2d 360, 362 (Ala. Crim. App.1990), *aff'd*, 590 So.2d 369 (Ala. 1991), *cert. denied*, 503 U.S. 974, 112 S.Ct. 1594, 118 LED.2d 310 (1992); *Falkner v. State*, 586 So.2d 39 (Ala. Crim. App. 1991).

The defense may have intentionally allowed the admission of the out-of-court declarations of the informant in order to reap the mitigating benefit of the informant's statement that the defendant was "out of control." Indeed, at the sentencing phase, the defense did argue the sixth statutory mitigating factor-that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." (Emphasis added.) Section 13A-5-51, Ala.Code 1975.

Moreover, rulings by the trial court either excluding the informant's out-of-court declarations or prohibiting the prosecutor's argument regarding the declarations could not have substantially increased the likelihood of either an acquittal or a life-without-parole recommendation. The State's evidence against the defendant was chiefly that the authorities had seized the murder weapon from the defendant's possession and that the defendant had given a detailed confession describing not only the murder itself but also the defendant's bizarre and cruel conduct culminating in the murder. Two police officers observed and heard the confession and recounted it to the jury with enough consistency to impart great credibility to their testimony and, indeed, just enough inconsistency in some details to prevent their testimony from being sus-

> pect as the product of improper collaboration. The out-of-court declarations by the informant pale into insignificance in comparison with this other damning evidence. Furthermore, the trial judge expressly instructed the jury not to consider the informant's out-of-court declarations for the truth of the matter stated. Thus we do not find prejudice that would warrant relief under the plain-error rule.

Ex parte Mason, 768 So.2d 1008, 1011-1012 (Ala. 2000).

To the extent that the last paragraph of the Alabama Supreme Court's decision regarding the potential prejudice of confidential informant's statements contains factual findings, those findings are entitled to a presumption of correctness. If this court were entitled to independently review the hearsay question as a distinct and separate aspect of Mason's Confrontation Clause claim, the court would concur with the factual findings made by the state court in determining whether Mason is entitled to relief. The evidence of Mason's guilt was overwhelming and, as such, his trial was not rendered fundamentally unfair by the admission of the confidential informant's statements. This claim is due to be denied.

C. **Jury instructions given during the guilt and sentencing phases deprived Mr. Mason of a fair trial.** (Doc. 17, ¶¶ 62-73 at 28-34).

1. **Failure to instruct on intoxication to negate specific intent.** (Doc. 17, ¶¶ 62-64 at 28-29).

2. **The trial court reversibly erred in instructing the jury at the sentencing phase of the trial.** (Doc. 17, ¶¶ 65-73 at 29-34).

Mason did not raise these claims on direct appeal. The claims were presented for the first time in his Rule 32 petition and found by the trial court to be procedurally defaulted pursuant to Ala. R. Crim. P. 32.2(a)(3) & (5). (Rule 32 C.R. Vol. 16, Tab. 55 at 62). Mason's notice of appeal from the denial of the Rule 32 petition was dismissed as untimely by the Alabama Court of Criminal Appeals. (*Id.* at Tab. 56). For these reasons, and after a careful examination of the record and applicable law, this court finds it is precluded from further review of these claims. The claims are procedurally defaulted and due to be dismissed.

D. Several of the trial court's rulings deprived Mr. Mason of constitutional protections and therefore constitute reversible error. (Doc. 17, ¶¶ 74-87 at 34-40).

1. The trial court erred in admitting into evidence highly prejudicial expert testimony. (Doc. 17, ¶¶ 74-75 at 34-35).

Mason alleges the trial erred when it allowed forensic scientist John Kilbourn to testify that a "'Negroid'" hair found on the victim's pubic region was "'consistent'" with a pubic hair taken from Mason. (Doc. 17 at 34) (quoting R. 758-62). According to Mason, the testimony was "highly inflammatory" and "had no probative value" as Kilbourn also "testified that he had no way of knowing how many other men in Madison County had hair with the same characteristics as the 'Negroid' hair in question," that he could not identify the hair as Mason's, or that it was even a pubic[17] hair. (*Id.* at 34-35)(quoting R. 777-78).

Mason concedes that this claim was not raised by counsel on direct appeal, but nonetheless encourages the court to conduct a *de novo* review

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[17] Kilbourn testified that in his opinion, the foreign hair found in the victim's pubic area was a pubic hair of African derivation. (R Vol. 5, Tab 12 at 760) He also later testified "but, as I say, sometimes hairs are - from different body origins [such as chest hair], can look very, very similar [to pubic hair]." (R Vol 5, Tab. 12 at 777) He did not compare Mason's chest hair to the hair found in the victim's pubic area. (*Id*). He did compare Mason's head hair to the found hair and opined that the found hair was "definitely" not Mason's head hair. (*Id* at 762)

of it by inferring that the state appellate courts conducted an "independent" merits review of it. (Doc. 35 at 64-65). Mason supports this argument by asserting:

> [T]he Court of Criminal Appeals "searched the entire record for any error that may have adversely affected the appellant's substantial rights, whether or not brought to our attention or to the attention of the trial court." *Mason v. State*, 768 So.2d 981, 1007 (Ala. Crim. App. 1998). The Alabama Supreme Court implicitly adopted "the result on every issue addressed by the Court of Criminal Appeals" after its own independent review. *Ex parte Mason*, 768 So.2d 1008, 1010 (Ala. 2000). As the claim has been fully reviewed on direct appeal, the State cannot argue now that this claim is procedurally defaulted.

(*Id.*).

The quotations taken from the state appellate courts' opinions are nothing more than an acknowledgment of the existence of routine plain error review utilized during the direct appeal review process of capital cases in Alabama. "[I]t [is] . . . a well-established principle that a state appellate court's routine plain error review of a conviction or sentence does not, standing alone, excuse a procedural default." *Peoples v. Campbell*, 377 F.3d 1208, 1235, n. 55 (11th Cir. 2004) (other citations omitted). Other than stating it had examined the record for plain error and found none, on direct appeal the state appellate courts

engaged in no analysis of the merits of this particular claim. As such, contrary to Mason's assertion, the claim was not 'fully reviewed' on direct appeal. It is procedurally defaulted.[18]

Mason alternatively argues that if the court finds the claim to be procedurally defaulted, the failure of his counsel to raise the claim on direct appeal establishes the necessary cause and prejudice to overcome the procedural default of the claim. (Doc. 35 at 65).

In *Eagle v. Linahan*, 279 F.3d 926 (11th Cir. 2001), the Eleventh Circuit explained ineffective assistance of counsel in the context of cause and prejudice to excuse a procedural default:

> The Supreme Court, ... made clear in *Murray v. Carrier*, 477 U.S. 478, 486-87, 106 S.Ct. 2639, 2644, 91 LED.2d 397 (1986), that "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." This is true whether the procedural default resulted from counsel's failure to make a claim at trial or failure to raise a claim on appeal. *Id.* at 492, 106 S.Ct. at 2647 (holding that "counsel's failure to

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[18] The post-conviction court did not interpret the direct appeal in the manner Mason suggests either When the claim was raised during post-conviction proceedings, the trial court found it to be procedurally defaulted pursuant to ALA R. CRIM P. 32 2(a)(2) and (5) in that it was raised and addressed at trial and could have been, but was not raised on direct appeal. (Rule 32 C R Vol. 16, Tab. 55 at 61) Mason failed to timely appeal from the post-conviction court's decision

> raise a particular claim on appeal is to be scrutinized under the cause and prejudice standard when that failure is treated as a procedural default by the state courts"). Moreover, attorney error is cause for procedural default only if the error rises to the level of constitutionally deficient assistance of counsel under the Sixth Amendment. *Id.* at 488, 106 S.Ct. at 2645.

Id. at 937.

A claim of ineffective assistance must itself be both exhausted *and* not defaulted in state court before it can be asserted as cause. *Hill v. Jones*, 81 F.3d 1015, 1030-31 (11th Cir. 1996). If the ineffective assistance claim is defaulted, then a petitioner must demonstrate independent cause and prejudice excusing the default of the ineffectiveness claim before that claim can be asserted as cause in relation to a second, substantive claim. (*Id.*).

Mason did raise an ineffective assistance of appellate counsel claim concerning Kilbourn's testimony in his Rule 32 petition.[19] However, the

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[19] In his Rule 32 petition, Mason did allege that appellate counsel were ineffective for failing to raise as an issue that.

> The trial erred in admitting highly inflammatory and prejudicial testimony of little or no probative value when it allowed Mr John Kilbourn to testify that hair found in the pubic region of the victim was "consistent" with pubic hairs taken from Mr. Mason *See infra* Issue VI ([the substantive claim] incorporated by reference)

(Rule 32 C.R Vol. 14, Tab. 41 at 18) (bracketed portion by this court)

post-conviction court dismissed the claim for failing to meet the "specificity and full factual pleading requirements of Rule 32.6(b) ARCrP." (Rule 32 C.R. Vol. 16, Tab. 55 at 58). It noted that Mason failed to cite any legal authority to support an argument that, had counsel raised the claim on direct appeal, the appellate courts would have excluded Kilbourn's testimony. (*Id.*).

Mason failed to timely appeal from the trial court's rejection of the claim in the Rule 32 petition. Moreover, Mason has not raised an independent ineffective assistance of appellate counsel claim in his habeas petition. Even if he had, the habeas claim would be procedurally defaulted because Mason failed to timely appeal from the state post-conviction court's dismissal of the claim as insufficiently pleaded pursuant to ALA.R CRIM. P. 32(6)(b). For the foregoing reasons, Mason cannot rely on his appellate counsel's purported ineffectiveness to establish cause to excuse the procedural default of the substantive claim at issue because the ineffectiveness claim itself is procedurally defaulted. For these reasons, and after a careful examination of the record and applicable law, this court finds it is precluded from further review of the claim. This claim is procedurally defaulted and due to be dismissed.

2. **The trial court erred in denying petitioner's motion to suppress the search of his vehicle.** (Doc. 17, ¶¶ 76-77 at 35-36).

Mason alleges that, after his arrest, "his car was impounded by Officer Hasty" and Hasty recovered the murder weapon from the car after performing

an inventory search that was not in accordance with "any standardized procedure." (Doc. 17 at 35-36). He contends a standardized procedure is constitutionally mandated and, as such, the trial court's refusal to suppress the murder weapon at trial was erroneous. (*Id.* at 36) (citing *Florida v. Wells*, 495 U.S.1 (1990)).

Respondent answers that, under *Stone v. Powell*, 428 U.S.465 (1976), "a federal court cannot entertain a Fourth Amendment claim by a habeas petitioner attacking his state court conviction if the petitioner had an opportunity for full and fair consideration of that claim in the state trial and appellate courts." (Doc. 24 at 18) (also referring to *Harris v. Dugger*, 874 F.2d 756 (1989)).

Alternatively, respondent contends that Mason cannot show that the state court's adjudication of the claim on direct appeal is contrary to or an unreasonable application of clearly established federal law or an unreasonable determination of the facts in light of the evidence before it. (*Id.* at 18-19).

Mason does not dispute that, following a hearing, the trial court denied his motion to suppress, or that the Alabama Court of Criminal Appeals found no error on direct appeal. He complains the trial court made no findings to support its ruling and the appellate court's opinion was "not adequate to qualify as 'full and fair consideration'" of the claim. (Doc. 35 at 79-80)(quoting *Agee v. White*, 809 F.2d 1487 (11th Cir. 1987)(other citations omitted by this court).

After careful review of the record, this court finds that the *Stone* doctrine prohibits federal habeas consideration of this claim. With the pre-

trial motion and the subsequent suppression hearing, Mason's counsel had ample opportunity to raise all aspects of this claim. He was able to conduct cross-examination of Officers Goings and Hasty regarding inventory searches of vehicles as well as police department policy concerning such searches. (R. Vol. 2, Tab. 6 at 117, 144-58). It was only after the consideration of this evidence that the trial court denied the motion. The Alabama Court of Criminal Appeals issued a lengthy opinion denying the claim on direct appeal. *Mason v. State*, 768 So.2d 981, 996-999 (Ala. Crim. App. 1998). The opinion included findings that Mason's arrest was lawful and that impoundment of his vehicle was lawful. (*Id.* at 998). The appellate court also held that

> Contrary to [Mason's] assertion, there was evidence regarding the police department's policy on inventory searches. While the testimony regarding the inventory procedures was not as detailed as it could have been, there was sufficient evidence produced to determine that there was a policy, what that policy was, the reasonableness of the policy, and that the officers acted in compliance with the established criteria when they conducted the inventory search-especially in light of the fact that the appellant did not raise this particular ground either before or during the suppression hearing, where it could have been thoroughly addressed. Accordingly, we find no plain error in the trial court's denial of the appellant's motion to suppress the evidence found in his vehicle.

> Even if we were to conclude that the search was not authorized pursuant to an inventory search, the trial court's denial of the motion to suppress is due to be affirmed because the search of the appellant's vehicle was lawful as a search incident to an arrest. *Sheffield*, 606 So.2d at 187. This is so even though the appellant was alreadyhandcuffed and placed in the police officer's car when the appellant's car was searched. *Gundrum v. State*, 563 So.2d 27 (Ala. Crim. App. 1990).

Mason v. State, 768 So.2d 981, 999 (Ala. Crim. App. 1998).

The Alabama Supreme Court affirmed the appellate court's decision. *Ex parte Mason*, 768 So.2d 1008, 1013 (2000). Mason was afforded a full and fair opportunity to adjudicate this Fourth Amendment claim in the state court during the direct review process.[20] He also received full and

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[20] In his reply brief, Mason contends that if this court finds that *Stone* bars federal review of the claim, then the ineffectiveness of his trial counsel to investigate and preserve the procedure and policies aspect of issue on direct appeal supplies the necessary cause to overcome the bar However, Mason has not presented the underlying factual claims in connection with an independent ineffectiveness claim in his habeas petition Even if he had, it would be procedurally defaulted because, although Mason raised just such a claim in his Rule 32 petition (*see* Rule 32 C.R Vol 14 Tab 41 at 6), he failed to timely appeal the Rule 32 court's denial (*see i d.*, Vol. 16, Tab 55 at 17) of the claim on the merits during post-conviction review, which was based in part on the appellate court's findings on direct appeal Mason has never denied that he failed to effectuate a timely appeal from the rejection of his Rule 32 petition or that his Notice of Appeal was dismissed by the Alabama Court of Criminal Appeals because of its untimeliness A procedu-

fair consideration of the claim in the state court. Pursuant to *Stone v. Powell*, this court will afford no further discussion to this claim.

3. **The trial court erred in denying petitioner's motion to suppress his custodial statement.** (Doc. 17, ¶¶ 78-81at 36-38).

On direct appeal, this *entire* claim read:

> As mentioned in the preceding argument[21], Mason was placed under arrest for assault in the third degree. . . . during the evening of March 29, 1994. Mason was transported to the Huntsville Police Department, and there he was interrogated for several hours by detectives. Mason's contention is that his arrest on the third-degree assault was merely a pretext for the police to interview him about the homicide of Ms. Cagle. Mason confessed to the third-degree assault, and as such any further questioning of Mason regarding other alleged incidents was in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The continued questioning of Mason after his alleged statement regarding the misdemeanor assault was in violation of his rights

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rally defaulted ineffective assistance of counsel claim cannot serve as cause to overcome the procedural default of another claim. *Hill v. Jones*, 81 F 3d 1015, 1030-31 (11th Cir 1996)

[21] Referring to his argument that the trial court erred when it denied his motion to suppress the search of his automobile. (C R. Vol 12, Tab 34 at 19)

> under *Miranda*, and as such, the alleged custodial statement should have been suppressed by the trial court.

(C.R. Vol. 12, Tab. 34 at 20).

Mason repeats the allegation in his habeas petition. (Doc. 17, ¶¶ 78 and 80 at 36-37). Additionally he declares that his Sixth Amendment right to invoke counsel was violated and, further, that his statement concerning the Cagle murder was the product of physical and mental coercion. (*Id.*, ¶¶ 78, 79 and 81 at 36-38). The additional claims were presented for the first time in Mason's Rule 32 petition. The new claims were dismissed as procedurally defaulted by the trial court because the claims were raised at trial and could have been but were not presented on direct appeal. (*See respectively*, (Rule 32 C.R. Vol. 14, Tab. 41 at 20-21) and (*id.*, Vol. 16, Tab. 55 at 60-61) (citing A. R. CRIM. P. 32.2 (a)(2) and (5)). Mason filed a notice of appeal from the rejection of this claim. The Alabama Court of Criminal Appeals then dismissed that appeal as untimely in accord with Alabama procedural rules, a fact that Mason has never disputed. For the reasons set out above, Mason's claim that his Sixth Amendment right to counsel was violated and that he was coerced into making a statement are procedurally defaulted. These issues are due to be dismissed.

The only allegations that are *potentially* subject to habeas review are those that were raised on direct appeal; *i.e.*, whether Mason's statement concerning the Cagle murder should be suppressed because it was the product of a pretextual arrest for third degree assault and, after having been read his *Miranda* rights and giving a state-

ment regarding the assault, he was interrogated for the Cagle murder without again being read his *Miranda* rights. (Doc. 17, ¶¶78 and 80 at 36-37)(citing *Miranda v. Arizona*, 384 U.S. 436 (1966); *Westover v. United States*, 384 U.S. 436 (1966)).

Respondent argues that *Stone v. Powell*, 428 U.S. 465 (1976), prohibits federal review of this claim because Mason "had an opportunity for full and fair consideration of that claim in the state trial and appellate courts." (Doc. 24 at 20-21). Alternatively, Respondent contends "the merits of this claim were addressed by the Alabama Court of Criminal Appeals on direct appeal and Mason does not allege the appellate court's decision was contrary to or an unreasonable application of clearly established federal law. (*Id.* at 21) (citing *Mason v. State*, 768 So.2d 981-999-1001 (Ala. Crim. App. 1998)).

Mason asserts that he did not receive "'full and fair consideration'" of the claim by the state court. (Doc. 35 at 79-80)(quoting *Agee v. White*, 809 F.2d 1487 (11th Cir. 1987)(other citations omitted by this court). The opinion of the Alabama Court of Criminal Appeals reads:

> The appellant contends that the trial court erred in denying his motion to suppress his custodial statement because, he claims, "his arrest on the third-degree assault was merely a pretext for the police to interview him about the homicide of Ms. Cagle." (Appellant's brief, p. 20.) As we noted in Part III of this opinion, the appellant filed three suppression motions; this ground was not specifically raised in

any of those motions. Furthermore, although the appellant hinted at this ground during the suppression hearing, he did not specifically move to suppress his confession on this basis. Accordingly, we must review his assertion pursuant to the plain error doctrine. Rule 45A, Ala. R. App. P.

The pertinent evidence presented at the suppression hearing established the following. The appellant was arrested pursuant to an outstanding arrest warrant against him for third-degree assault. Following the appellant's arrest, he was transported to the criminal investigation division (CID). En route to CID, the appellant asked what he was being arrested for and the officers told him he was being arrested for third-degree assault, and then an officer read him the arrest warrant. On the way to CID, there was no discussion regarding the murder of Angela Cagle.

At CID, the appellant was fingerprinted, photographed, and apprised of his rights. The appellant did not appear to be under the influence of alcohol or drugs. The appellant waived his rights and spoke with investigators about the assault charge. During the questioning regarding the assault charge, the investigators learned that a victim of a robbery and an assault that had occurred approximately two weeks earlier had identified the

appellant as the assailant from a photographic line-up. The appellant was then informed that he was under arrest for robbery and attempted murder. He was again apprised of his rights. The appellant waived his rights and denied any knowledge of the robbery/attempted murder incident.

An investigating officer then questioned the appellant about the gun found in the appellant's vehicle. The appellant admitted that he had a gun in his vehicle, but he said that it did not belong to him. During the course of the questioning, the investigating officers were informed that the gun found in the appellant's vehicle was the murder weapon. When the appellant was confronted with this information, he denied any knowledge of the murder.

The appellant subsequently asked to speak with Investigator Bud Parker alone. Parker again advised the appellant of his rights. The appellant waived his rights and confessed to the murder of Angela Cagle.

> "'In *Scarbrough* [*v. State*, 621 So.2d 996 (Ala. Cr. App. 1992)], we adopted the "objective" test set forth by the Fifth Circuit Court of Appeals with regard to determining the validity of an alleged pretextual arrest:

"'"'Again and again in precisely the present context, the [Supreme] Court has told us that where police officers are objectively doing what they are legally authorized to do-as in arresting [the defendant] pursuant to the valid warrant outstanding against him and interrogating him without coercion after reading him repeated Miranda warnings - the results of their investigations are not to be called in question on the basis of any subjective intent with which they acted. . . .

"'"'. . . The relevant principle of the Supreme Court is likewise: so long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry. . . . The correct rule is that, while a showing of objectively reasonable good faith on the part of the police officers will ordinarily redeem honest errors and prevent the application of the exclusionary rule, in a case where the officers have taken no action except what the law objectively allows [,] their subjective motives in doing so are

> not even relevant to the suppression inquiry. And the reason lies in the purpose of that rule: to deter unlawful actions by police. Where nothing has been done that is objectively unlawful, the exclusionary rule has no application and the intent with which they acted is of no consequence.'"
>
> "'"....
>
> "'*United States v. Causey*, 834 F.2d 1179, 1184-85 (5th Cir.1987) (emphasis in original) (footnotes omitted)." *Scarbrough*, 621 So.2d at 1004."

Webster v. State, 662 So.2d 920, 921-22 (Ala.Cr.App. 1995), quoting *Fletcher v. State*, 621 So.2d 1010, 1022-23 (Ala.Cr.App. 1993). *See*, also, *Hutcherson v. State*, 677 So.2d 1174 (Ala. Cr. App.1994), rev'd on unrelated ground, 677 So.2d 1205 (Ala. 1996).

In this case, the police arrested the appellant pursuant to an outstanding warrant for third-degree assault. The appellant does not challenge the validity of the arrest warrant. The evidence established that the appellant was advised of his rights three separate times, and that each time he knowingly and voluntarily waived his rights and spoke with the police. There was no evidence that the

> appellant was under the influence of drugs, or that his confession was coerced by inducements or threats. "As long as the police officer is doing only what is objectively authorized and legally permitted, the officer's subjective intent in doing it is irrelevant." *Ex parte Scarbrough*, 621 So.2d 1006, 1010 (Ala. 1993). In this case, the officers' arrest and questioning of the appellant were objectively reasonable; accordingly, we find no plain error in the trial court's denial of the motion to suppress the appellant's custodial statement.

Mason v. State, 768 So.2d 981, 999 -1001 (Ala. Crim. App. 1998).

The opinion of the Alabama court establishes that there was full and fair consideration of the claim. *Stone v. Powell*, 428 U.S. 465 (1976), prohibits federal review of the claim, and it is due to be dismissed.

4. **The trial court erred in denying petitioner's request to visit the scene of the crime with his attorneys.** (Doc. 17, ¶¶ 82-83 at 38-39).

This claim is identical to a claim asserted in Mason's brief on direct appeal. (Doc. 17 at 38-39) and (C.R. Vol. 12, Tab. 34 at 26). Mason argues that the trial court deprived him of due process and effective counsel when it denied trial counsel's motion to view the crime scene with Mason so that counsel could "properly investigate the case and prepare the defense." (Doc. 17 at 38-39). Respondent answers that Mason cannot show that the

Alabama Court of Criminal Appeals' rejection of this claim on direct appeal is contrary to or an unreasonable application of clearly established federal law or an unreasonable determination of the facts in light of the evidence before it. (Doc. 24 at 26-28).

The pertinent portion of the Alabama Court of Criminal Appeals opinion reads:

> The appellant maintains that the trial court erred in denying his request to visit the scene of the crime with his attorneys. He argues that the trial court's refusal to allow him to visit the scene with his attorneys denied him the effective assistance of counsel.
>
> In a pretrial motion hearing, the trial court denied the appellant's request to visit the scene of the crime with his attorneys. The trial court ruled that because the appellant was being held in jail without bond, the court could not allow the appellant to visit the scene without a compelling reason to do so; however, the trial court indicated that the appellant's counsel were free to visit the scene. The appellant did not offer the trial court any reason he needed to view the scene of the crime-other than his general assertion in his written motion that his presence at the scene was necessary to assist his counsel in the investigation of the crime-nor did he specifically explain how his defense would be prejudiced if he were not allowed to view the scene. Accordingly, we

> find no error in the trial court's denial of the appellant's motion to view the scene of the crime with his attorneys.
>
> Moreover, the appellant has not established how the trial court's ruling denied him the effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, the appellant must show that his counsel's performance was deficient and that, but for his counsel's deficient performance, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The appellant has met neither prong of the two-pronged test set out in *Strickland*. The appellant does not indicate how the trial court's ruling rendered his counsel's performance deficient, nor does he explain how his viewing the scene of the crime with his attorneys could have changed the outcome of the proceedings. Accordingly, the appellant is due no relief on his assertion that the trial court's refusal to allow him to visit the scene denied him the effective assistance of counsel.

Mason v. State, 768 So.2d 981, 1004 -1005 (Ala. Crim. App. 1998).

Mason offers no explanation or argument asserting that such a legal or factual finding made by the state appellate court is inconsistent with 28 U.S.C. § 2254(d). Accordingly, this claim is due to be denied.

5. **The trial court erred in submitting for the jury's consideration the aggravating circumstance that the capital felony was especially heinous, atrocious or cruel.** (Doc. 17, ¶¶ 84-87 at 39-41).

To the extent that Mason alleges there was no evidence to support submission of the heinous, atrocious, or cruel (HAC) aggravating circumstance to the jury, this claim is identical to one raised on direct appeal. (Doc. 17 at 39-41) and (C.R. Vol. 12, Tab. 34 at 23-24). Mason declares, "[t]he State based its [HAC] argument on the mere speculation that the first bullet wound to Ms. Cagle was not fatal, and would have caused her substantial pain. (R. 1605-1606.)" (Doc. 17 at 39). Yet, "the forensic pathologist, . . . Dr. Embry testified at trial that it was not possible for him to conclude which wound occurred first." (*Id*).

The Alabama Court of Criminal Appeals rejected this claim, holding:

> The appellant contends that the trial court improperly allowed the jury to consider as an aggravating circumstance that the offense was "especially heinous, atrocious or cruel compared to other capital offenses"[4] (Issue VI). . . . .[22] The gist of the

[22] On direct appeal, Mason also alleged, as a separate claim (identified by Alabama Court of Criminal Appeals as "Issue VII"), that the trial court improperly found the existence of the heinous, atrocious, or cruel ("HAC") aggravating circumstance. The appellate court's opinion simultaneously addressed the constitutionality of the trial court's submission of this aggravating circumstance to the jury and the trial court's finding of the existence of the aggravating

appellant's argument is that ... this aggravating circumstance is based primarily on the assumption that the first bullet wound did not kill the victim, but caused the victim substantial pain - a finding that, he claims, is not supported by the record. In support of his contention, he argues that because the forensic pathologist who performed the autopsy on the victim could not conclusively determine which of the two bullet wounds occurred first, there was no evidence to support a finding that the first wound to the victim caused severe pain and suffering, but did not kill the victim. The appellant did not object to the submission of this aggravating circumstance to the jury, nor did he object to the trial court's finding of this aggravating circumstance; therefore, his assertions must be reviewed pursuant to the plain error doctrine. Rule 45A, Ala.R.App.P.

FN4. See § 13A-5-49(8), Code of Alabama 1975.

While it is true that the forensic pathologist was not able to conclusively determine which bullet wound occurred first, a reasonable inference from the record is that the painful, nonfatal injury occurred first. Dr. Embry testified that the bullet

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circumstance. In his habeas petition, Mason complains only that the trial court erred when it submitted the HAC factor to the jury for its consideration. Nonetheless, for reasons explained further in the body of this opinion, the trial court's findings shall also be included

wound to the victim's left cheek was fairly superficial in that it would not cause loss of consciousness or death; however, he testified that such a wound would be extremely painful. Dr. Embry testified that the victim would still have been able to move her legs after the gunshot wound to the left cheek. According to Dr. Embry, the gunshot wound to the victim's right cheek was "instantly" fatal - the victim could not have moved her leg after suffering the bullet wound to the right cheek. The appellant confessed that he shot the victim a second time after he saw her move her leg. Furthermore, she was found lying on her left side; the bullet wound to her right cheek was clearly visible. Thus, one can reasonably infer from the evidence that the first bullet wound caused the victim great suffering, but that it did not kill her.

Moreover, the determination of the existence of the aggravating circumstance that the crime was especially heinous, atrocious, or cruel compared to other capital offenses was not based solely on the fact that the first bullet wound caused the victim great suffering; rather, it was based on a combination of factors. The trial court found, in pertinent part:

> "The capital offense was especially heinous, atrocious or cruel compared to other capital offenses. The

Court reaches this conclusion based upon the following evidence:

"(a) The victim, Mrs. Cagle, was alone, defenseless and of no physical threat to the Defendant.

"(b) The Defendant caused or directed the victim to disrobe in his presence, obviously inflicting great fear and humiliation in the victim prior to her death. There is no logical explanation for this behavior on the part of the Defendant except his indifference and even enjoyment of the suffering of this victim.

"(c) The victim was shot twice at close range as indicated by the expert testimony. The first shot did not kill the victim but caused great pain as a result of the shattering of the bone or bones in her face. The second shot was fired into her face as she lay helpless and suffering from the first gunshot wound to the other side of her face.

"(d) The Defendant planned this crime in advance, obtaining the gun used to kill the victim several days earlier and by parking his vehicle out of view and behind the store.

"(e) The Defendant intended to kill the victim by shooting her the second time, realizing that she was still alive, so that there would be no witness to this crime.

"(f) The most heinous, atrocious or cruel aspect of this crime was the execution-style killing of this victim. The court can conclude from the evidence presented, and from the confession of the Defendant, that he first made the victim go into the back storage room of the convenience store, which was not visible from the other parts of the store, or to anyone who might pass. He caused the victim to completely disrobe except for her socks, all of her clothing being found under or near the desk on which her body was found. He shot her at close range while she sat naked and completely vulnerable to the actions of the Defendant. Realizing that Mrs. Cagle was not dead because he saw her move, he inflicted the fatal gunshot wound at close range into the right side of her face. The Court concludes that the crime of this Defendant was extremely

> wicked, shockingly evil, outrageously wicked and vile and cruel, with the actions of the Defendant designed to inflict a high degree of pain and fear in the victim, with utter indifference to, or even enjoyment of, the suffering of this victim. Any murder of a defenseless victim is to some extent heinous, atrocious and cruel, but the degree of heinousness, atrociousness and cruelty, with which this offense was committed, exceeds that common to all capital offenses."

(C.R. 253-54.)

As evidenced from the above, the finding that the crime was especially heinous, atrocious, or cruel when compared to other capital offenses was based not only on the fact that the first bullet wound caused the victim intense pain, but also on the manner of the murder, as well as the fear and humiliation that the victim most certainly experienced before her death. These are appropriate factors to consider in determining the existence of this aggravating factor. See *Ex parte Rieber*, 663 So.2d 999 (Ala.1995). Accordingly, the trial court did not err in allowing the jury to consider as an aggravating factor that the crime was especially heinous, atrocious, or cruel, nor did it err

> in finding the existence of this aggravating circumstance.

Mason v. State, 768 So.2d 981, 1002 -1004 (Ala. Crim. App. 1998).

In the habeas petition Mason *does not claim the trial court erred* when it found the existence of the HAC factor. Mason now argues only that it was trial error to allow the jury to consider the existence of the HAC factor because the State's basis for arguing it relied solely on a determination of whether the first or second bullet resulted in the victim's death.

A review of the State's arguments at the penalty phase of trial makes it clear that the HAC factor was not presented to the jury based exclusively on an inference from the evidence as to whether she suffered after being shot the first time. While Assistant District Attorney Karen Hall did concentrate on this aspect of the HAC factor in the prosecution's opening argument after the close of the penalty phase of trial, on rebuttal, District Attorney Tim Morgan expanded the prosecution's presentation of the HAC factor far beyond this evidence. Morgan stated:

> [W]e have proven to you beyond a reasonable doubt that a murder, intentional murder, was committed during the commission of a robbery, and that the robbery itself is an aggravating circumstance. So we have proven one to you. And the Judge says we don't have to prove anything else to you, that's enough. But we—Mrs. Hall has argued and I . . . argue to you, also, that we have proved through the evidence

> presented to you, the testimony of Dr. Embry, the testimony of Bud Parker who gave you or told you what this defendant told him he did, testimony that proved a cold-blooded, calculated execution style or execution-type slaying. I can't thinks of one that could be much more cold-blooded and much more execution style than this one was.
>
> You recall the testimony and you recall the evidence, and I don't need to go over that and stand up here and talk about it, but when a person shoots another and then has the presence of mind to say, "Well, I just don't believe she's dead and I don't intend to leave any live witnesses," and fires one more slug through her brain to kill her, I don't know what could be more heinous, atrocious, or cruel than that. And I think the law is on our side. But, again, you don't have to accept that if you don't want to. And the Court will instruct you of that, and the Court will tell you that you have to consider any mitigating circumstances that they have shown to you. And I ask you to do that.
>
> . . . .

(R. Vol. 10, Tab. 26 at 1624-25).

Morgan repeated that he did not think it was necessary to go through the details of how heinous, atrocious, or cruel the crime was because the jury had heard the trial testimony. (*Id.* at 1625).

Morgan's specific reference to Bud Parker's testimony regarding the details of Mason's confession to him as well as reminding the jury to recollect the evidence presented to them shows that the prosecution's presentation of the HAC factor was not based solely on whether the first bullet fired by Mason killed the victim. It was not improper to allow the jury to consider that aggravating circumstance. In fact, the specific facts supporting the trial court's finding of the HAC factor in the sentencing order are derived from the testimony of Bud Parker and Mason's own statement of events surrounding the crime. The fear, humiliation and suffering of the victim prior to her death - all components of the HAC factor in this case - were just as important as the question of whether or not she physically suffered after Mason shot her the first time.

As a final note, Mason asserts that consideration of the HAC factor was improper because the prosecutor argued that Cagle's death was an execution-style killing, a type of murder that the Alabama Supreme Court rejected as being heinous, atrocious, or cruel in *Ex parte Clark*, 728 So.2d 1126 (Ala. 1998). Once again, Mason overlooks the fact, that in his case, the State relied upon and Alabama courts have consistently interpreted Alabama's HAC factor as including psychological torture as well as physical suffering after an assault. *See Ex parte Key*, 891 So. 384, 390-91 (Ala. 2004); *Ex parte Reiber*, 663 So. 2d 999 (Ala. 1995).

Unlike the victim in *Ex parte Clark*, who was unaware when the defendant approached him from behind and shot him to his death with six

successive bullets, Mason's victim was clearly subjected to psychological torture and there was more than enough evidence for the jury to infer that she physically suffered after Mason shot her the first time. For the foregoing reasons, Mason cannot show that the state court's rejection of this claim is contrary to or an unreasonable application of clearly established federal law, or an unreasonable determination of the facts in light of the evidence before it. This claim is due to be denied.

E. Prosecutorial misconduct and error throughout the guilt and sentencing phases deprived petitioner of a fair trial. (Doc. 17, ¶¶ 88-117 at 40-51).

1. **The prosecution invited the jury to speculate on inadmissible evidence during the guilt phase.** (Doc. 17, ¶¶ 91-93 at 41-42).

2. **The prosecution misstated the law during the guilt phase.** (Doc. 17, ¶¶ 94-96 at 42-43).

The court shall address subclaims 1 and 2 together because the Alabama Court of Criminal Appeals' opinion intertwines the factual and legal findings of a portion of those claims.

a. *General statements concerning evidence and the role of a prosecutor.*

Mason complains that, during closing argument, the district attorney improperly "impl[ied] that mere legal technicalities kept substantive evi-

dence from the jury, and invit[ed] the jury to speculate about non-record information[ ]" by stating generally "that there are limitations imposed . . . regarding the admission of certain evidence." (Doc. 17 at 41) (citing R. 1400-1401). He also made a general misstatement of the law when he informed the jury that his position is such that he has a "' dual function'" to represent the people of the Alabama and the defendant. (*Id.* at 42) (quoting R. 1401)). Mason declares "a reference to the prosecution representing the accused is improper. . . . [and] prejudicial because it divests from the jury the idea that the proceeding is adversarial, effectively asking the jury to consider the prosecution's evidence." (*Id.*). Mason does not dispute that trial counsel made no objection to the prosecutor's argument.

Respondent asserts that Mason cannot show the state courts' rejection of these claims is contrary to or an unreasonable application of clearly established federal law, or an unreasonable interpretation of the facts in light of the evidence before it. (Doc. 24 at 30-34).

The Alabama Court of Criminal Appeals' opinion on these issues reads:

> The appellant contends that the district attorney "made numerous impermissible comments to the jury." (Appellant's brief, p. 14.) Specifically, he maintains that the district attorney improperly stated to the jury that there are "limitations imposed on the State in criminal trials regarding the type of testimony that is admissible." He claims this comment "clearly invited

the jury to speculate about non-record information." (Appellant's brief, p. 14.) He also alleges that the district attorney improperly argued that he represented the accused. In support of his contentions, he refers this court to the following portion of the district attorney's closing argument in rebuttal:

> "As I said earlier in this case, I'm not the State of Alabama. . . . The State of Alabama is everyone in this courtroom, everyone who is a citizen of this community, of this county, and of this state, we are the State of Alabama. I represent you in this trial, that's my job. That's Ms. Hall's job.
>
> "Mr. Ferguson and Ms. Ferguson represent the defendant. They were retained by he or his family to represent him, and it's their job to come in here and give him the best representation that they can.
>
> "Now, the reason I bring this up is that because I represent the State of Alabama and this defendant is a part of or a citizen of this community, Ms. Hall and myself in some way also represent him. And because of that fact, the law says and the rules that have been developed over the years by our Supreme Court and our legislature, dictate . . . what we can and cannot do in a

criminal trial. And I know-or I suspect-I don't know, but I suspect that at some point during your deliberations, one or more of you will say to another one, 'Well, why didn't the State do this?' or 'Why didn't the State, the State's Attorney, say this? Why didn't they ask that witness this particular question? Why didn't they elicit this particular response to that question? Why didn't they produce into evidence and give us to examine a particular piece of evidence?' Well, if that question arises or any of those questions arise, that is your answer. We are limited by the rules of evidence, the rules of this court, and the laws of the State of Alabama. Because we function or serve a dual function and part of that being we, in some way, represent the defendant. So we have to be sure, as best we can, that this defendant gets a fair and impartial trial. So if any of you, during your deliberations, happen-that question comes up, 'Why didn't the State do this? Why didn't he say this? Why didn't she say that?' that may be the answer for your question. Please keep that in mind, we do have these rules. Ms. Hall and I have no quarrel with those rules. I have been doing this some twenty-odd years, and people before me a

> couple of hundred years, have been operating under these same rules. So we don't have any quarrel with them. They are good rules, they make our system work. But I wanted you to understand that the State, the prosecutor, is limited because of this dual role, this dual function and because of these rules that are made to make sure that a person charged with a crime gets a fair trial."

(R. 1399-1402.)

> When the comments are examined in context, it is clear that the district attorney was explaining to the jury that while his function was to represent the State of Alabama, he also had an obligation to ensure that the appellant received a fair trial, and in fulfilling that obligation, he was bound by evidentiary rules. The district attorney was not inviting the jury to speculate about nonrecord evidence. On the contrary, the district attorney was cautioning the jury that it should not speculate about matters that were not in evidence. We find no plain error in the district attorney's remarks.

Mason v. State, 768 So.2d 981, 991-92 (Ala. Crim. App. 1998).

The Alabama Supreme Court affirmed the decision of the Alabama Court of Criminal Appeals, and made its own findings as to the prosecutor's comment on his 'dual function':

> These statements were improper and objectionable. Had the defendant objected, the trial court would have been obliged to sustain the objections and to take curative action.
>
> In context, however, the essence of the prosecutor's argument was that, because he represented everybody in the community, he owed duties not only to prosecute the case vigorously but also to treat the defendant fairly. This description of his duties was correct. *Davis v. State*, 494 So.2d 851, 853 (Ala. Crim. App.1986); *Sprinkle v. State*, 368 So.2d 554, 561 (Ala. Crim. App.1978), writ quashed, 368 So.2d 565 (Ala.1979); *Gallant v. State*, 167 Ala. 60, 63, 52 So. 739, 741 (1910). In context, this argument does not warrant relief under the plain-error rule.

Ex parte Mason 768 So.2d 1008, 1012 (Ala.,2000)

Respondent correctly argues that Mason's petition[23] fails to cite authority to support his con-

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[23] In the prefatory paragraphs of the overall prosecutorial misconduct claim, Mason generally cites *United States v. Rojas*, 731 F.2d 707, 710 (11th Cir 1984), for the proposition that the Eleventh Circuit's "test for assessing a prosecutor's comments for reversible error is (1) whether the remarks were improper, and (2) whether they prejudicially affected the substantive rights of the defendant (Doc 17 at 40-41) He also writes, "*United States v. Garza*, 608 F 2d 659, 666 (5th Cir 1979)(prosecutor's introduction of his own personal opinion suggestion of the existence of information beyond that presented at trial to support his witness's credibility and use of status and influence of entire government investigatory apparatus to bolster the believability of case

tention that the district attorney's general comments concerning evidentiary rules and the prosecutor's due process obligations were improper much less prejudicial under United States Supreme Court precedent. (Doc. 25 at 49, 54). Nor does Mason attempt to provide any such support in his reply brief. (Doc. 35 at 54-58). In light of the reasoned opinions of the state courts on the subject, and Mason's failure to show that the decisions are contrary to or an unreasonable application of clearly established federal law, or an unreasonable interpretation of the facts in light of the evidence, Mason cannot show that he is entitled to 28 U.S.C. § 2254(d) relief and these claims are due to be denied.

b. *Comments about specific evidence and admissibility.*

1. *Excluded fiber evidence.*

Mason claims District Attorney Morgan improperly referred to excluded evidence by stating, "'the fibers, by the way, that were recovered from the body, we offered and defense objected, as they have a right to do, and the Judge ruled that they are not admissible and they are not in, so you don't have them.'" (Doc. 17, pp. 41-42) (quoting R. 1432)).

In his reply brief, Mason suggests that

> this argument was particularly prejudicial because: 1) it suggested that evidence was being hidden from the jury by the defense;

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affected substantial rights of defendant)." (*Id* at 41) Mason never applies either case to Claim E 1 or E 2.

> 2) it invited the jury to speculate that the evidence must have supported the prosecution if the defense objected to it; and 3) the prosecution had only moments before argued that the fibers had been left on the victim when Mr. Mason tried to rape her as "he tried to pry her legs apart, perhaps with his elbow, causing this bruise, rubbed up against her perhaps causing the fibers[24] on her left leg." (R. 1348). Reference to non-admissible evidence can be cause for reversal. *United States v. Pariente*, 558 F.2d 1186, 1189 (5th Cir. 1977)(reversing conviction where prosecutor referenced an alleged sworn statement made by defendant and because the jury may have believed the evidence showed the defendant's guilt but was not introduced because of a legal technicality).

(Doc. 35 at 55-56).

The argument sequence at the close of the guilt phase of trial was as follows: Assistant Attorney Karen Hall delivered the prosecution's initial statement, which included the rape comment quoted above. The court notes that Mason has never before proffered Hall's sexual assault argu-

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[24] While Assistant District Attorney Hall conceded the fibers did not match clothing seized from the defendant, she also stated she believed the police had seized the wrong clothing from Mason in that they had retrieved clothing he had worn to church earlier in the hours before the murder, and not the clothes he was wearing during the murder (R. Vol 8 at 1343, 1348) She also indicated she developed this belief from portions of Mason's own statement as to his activities and whereabouts on the day preceding the crime.

ment to establish that he was prejudiced by District Attorney Morgan's comment. Defense counsel then made its closing argument, and District Attorney Morgan's fiber argument occurred during rebuttal.

In any event, during its closing, defense counsel pointed out that investigators had chosen not to test either a shirt or smock that appeared to have blood on it and had not tested any Caucasian hairs recovered from the scene. (R. Vol. 8 at 1365-66). Counsel also inferred that officers removing the body at the scene of the crime were not careful about cross-contamination, arguing

> They stated they put the sheet on the floor [to remove the body], didn't say anything about how many hairs were on it, if the bathroom door was opened at the time. They state there's other investigators there, numerous people in and out, and they remove the body.
>
> Now, at that time they said there was some fibers. Ladies and gentlemen, what that has to do with it, I don't know, either. They state there some type of pink fibers.

(R. Vol. 8 at 1368).

It is against this backdrop that District Attorney Morgan's comment was examined for impropriety by the Alabama Court of Criminal Appeals:

> The appellant again suggests that a comment made by the district attorney during his rebuttal closing argument inappropriately "invited the jury to speculate on evidence not admitted in the trial." (Appellant's brief, p. 15.) Specifi-

cally, he argues that the district attorney committed reversible error when he told the jury that the trial court had sustained defense counsel's objection to the admission of fibers into evidence and then stated, "'so you don't have them.'" (Appellant's brief, p. 14-15.)

The district attorney argued, in pertinent part:

> "What about these hairs and everything that was collected at the scene? [Defense counsel] made some issue about why the Caucasian hairs were not compared to someone else. Well, I submit to you that in this case, very soon after this crime was committed, Huntsville Police Department had developed a suspect, and very shortly thereafter, within a couple of days, as I recall, he was arrested and made a statement that is contained in [Investigator] Bud Parker's report, which effectively eliminated anyone else as a suspect in this case. So the detectives who handled this case, I'm sure-and I haven't asked them this-didn't see the need to go on and search further for a suspect. We have got a guy who has confessed.
>
> "Besides that, as I recall, none of these hairs were compared to any known head hair, pubic hair, body hair, or otherwise, until sometime

> this year, which is about a year after the crime was committed. So during that period of time we have had all of those hairs, fibers - the fibers, by the way, that were recovered from the body, we offered and defense objected, as they have a right to do, and the Judge ruled that they are not admissible and they are not in, so you don't have them. But if we had found any other trace evidence that had any bearing on this case, either pointing towards the defendant's guilt or his innocence, we would have brought them to you.
>
> "As a matter of fact, the law requires us to let the other side know everything that we have, and we did in this case."

(R. 1431-1433.) (Emphasis added to highlight the portion the appellant finds objectionable.)

"[T]he prosecution must avoid statements that suggest to the jury that there exists evidence of a defendant's guilt that was not placed before the jury...." *Roberts v. State*, 735 So.2d 1244 (Ala. Cr. App.1997). When the comment alleged to be inappropriate is examined in context, it is clear that the prosecution was not suggesting that there was other evidence of the appellant's guilt. On the contrary, the prosecutor informed the jury that there

> was no additional evidence. Furthermore, although the actual fibers were not admitted into evidence, the jury was aware of the existence of the fibers because of the testimony from the trace evidence technician. The technician testified that the fibers had been collected from the thigh and calf area of the victim's leg, and that the fibers were not consistent with the victim's clothing. Accordingly, the prosecutor's reference to the fact that the trial court sustained defense counsel's objection to the admission of the actual fibers does not rise to the level of plain error.

Mason v. State, 768 So.2d 981, 993-94 (Ala. Crim. App. 1998).

After careful examination of the parties' arguments, and the opinion of the Alabama Court of Criminal Appeals, this court finds that Mason has failed to show that he is entitled to habeas relief. The jury was aware of the fibers because the evidence technician testified that the fibers found on the victim's body did not match either the victim's clothing or Mason's confiscated clothing. The jury listened to defense counsel cross-examine state witnesses regarding cross-contamination of the crime scene, a theme carried through by the defense during its closing argument. Morgan did not improperly comment on inadmissible evidence.

Even if Morgan's comment was impermissible, Mason's detailed confession to the murder along with the admissible physical evidence tending to corroborate that confession destroys any possibility that he could establish the requisite preju-

dice necessary to entitle him to habeas relief.[25] For the foregoing reasons, this claim is due to be denied.

2. *The confidential informant*

Mason alleges the prosecutor misstated the law when she argued, without objection "You must simply take, because it has been held admissible, the information that [Quincy] provided, as a matter of law." (Doc. 17 at 43) (quoting (R.1342) (brackets and underline by petitioner)).[26]

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[25] Until the filing of the reply brief in this habeas action, Mason has never specifically argued or complained that Hall's comment should be considered as support for the prejudice prong regarding Morgan's comment. In fact, on direct appeal and in this habeas action, the two arguments have always been listed and treated as separate claims Mason alleges that Hall's rape argument was improper because it was based on her personal belief and opinion, when there "there was absolutely no evidence in the record to support [the] position " (*See* (C R Vol 12, Tab 34 at 13) and *infra.*, Claim E.4) On the other hand, Mason alleges Morgan's fiber comment was improper because it "invited the jury to speculate on evidence not admitted in the trial " (*Id* at 14-15)

Even so, and even if Hall's opening comments, when combined with Morgan's comment, bootstrapped Morgan's argument into the realm of impropriety by suggesting to the jury that had law enforcement officials seized the clothing Mason was actually wearing on the night of the crime, the fibers would have matched those clothes, the overwhelming evidence against Mason shows that he was not so prejudiced by the reference that his trial was rendered fundamentally unfair

[26] In his reply brief, Mason also suggests, for the first time, that the prosecutor's comment constitutes improper

Respondent declares that Mason cannot show the decision of the state court is contrary to or an unreasonable application of clearly established federal law. (Doc. 24 at 32-34).

The Alabama Court of Criminal Appeals examined the claim and made the following findings of fact and conclusions of law:

> The appellant also argues that the assistant district attorney inappropriately "argued to the jury that they must take the information provided by the confidential informant 'as a matter of law,' a comment that, he claims, "is a clear misstatement of the law, and was calculated to mislead the jury." (Appellant's brief, p. 14.)
>
> During her closing argument, the assistant district attorney argued:
>
> > "In his opening, [defense counsel] stated a number of things, the most glaring of which I believe to be incorrect, was that the confidential informant was told by the uniformed officer there at the scene what type of weapon was used. I think it's important that I cover that with you. I don't necessarily believe this, but studies show that some jurors-or most jurors make up their mind about a case, I think they said 82% of all jurors make up

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vouching. (Doc. 35 at 50). This claim is procedurally defaulted and will not be considered

their minds after the opening statements, and they are not supposed to do that. And I hope that you have not done that. Because part of what was said by [defense counsel] was glaringly incorrect. And I hope that as he comes before you in his closing argument, he will admit that the statements he made about the confidential informant were in fact, and are in fact, incorrect.

"Investigator Renfroe told you that Officer Miller did not tell this suspect [sic] what type of weapon they were looking for, that Officer Miller did not know the caliber of the weapon they were looking for. And Officer Miller would have testified, but by agreement we didn't bring him in and put him on the stand; we allowed him to testify as to what Officer Miller would say. There is no dispute about that. And I think [defense counsel] will acknowledge that - that Officer Miller did not know what type of weapon was used and he did not tell this informant.

"Now, as a matter of law, information provided by a confidential informant is admissible, and, if proven to be reliable, which it was in this case, then the identity and certain other legal things must

happen, but because you were allowed to receive that confidential informant's information, it was in fact admissible, and because it was admissible and because it had been discussed by the parties and with the Judge and the law had been reviewed, the identity of this informant did not-does not and will not ever have to be revealed.

"Investigator Renfroe told you that when he was approached by this young man, he did so on the condition of anonymity, he wanted to remain confidential. Investigator Renfroe told you from the stand that to this day his identity remains confidential. It's known to the parties that need to know, but to the finders of the fact, *you must simply take, because it has been held admissible, the information that the confidential informant provided, as a matter of law.*

"This confidential informant, who is obviously known to the defendant, perhaps even a close friend of this defendant, said that he came to Investigator Renfroe because this young man, Derrick Mason, was out of control and wanting to make a name for himself on the streets."

(R. 1340-42.) (Emphasis added to highlight the portion the appellant finds objectionable.)

The allegedly inappropriate comment cannot be viewed in isolation, but rather should be viewed in the context in which it occurred. From our review of the record, it appears that the prosecutor's comments were directed toward statements made by defense counsel in opening arguments - in an apparent attempt to discredit the informant - that implied that the informant had learned from a police officer at the crime scene what type of weapon was involved. In her closing argument, the prosecutor reminded the jury that Investigator Renfroe testified that neither he nor Officer Miller had told the informant what type of weapon was involved. The prosecutor then told the jury why Officer Miller was not called to testify. The comment the appellant finds objectionable occurred as the prosecutor was explaining to the jury why the confidential informant had not been called to testify at trial.

When the allegedly objectionable comment is viewed in the context of the entire closing argument, it is apparent that the prosecutor was not telling the jurors that as a matter of law they had to believe the truth of what the informant said; rather, the prosecutor was explaining to the jury that as a matter of law the state was not required to reveal the identity of the

> informant. While perhaps the prosecutor's argument could have been clearer, we do not think the comment "'so infected the trial with unfairness as to make the resulting conviction a denial of due process'" *Burton*, 651 So.2d at 651, quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), especially in light of the fact that the trial court thoroughly instructed the jury that the testimony regarding what the informant said was not offered to prove the truth of what the informant is alleged to have said, but rather, it was offered to explain the sequence of events that followed from the officer's conversation with the informant. (See Part V of this opinion for a more detailed discussion regarding the admissibility of the information conveyed by the informant.) Finally, we note that the jury was cautioned many times that statements made by the attorneys were not evidence. Accordingly, the prosecutor's comment does not rise to the level of plain error.

Mason v. State, 768 So.2d 981, 990-991 (Ala. Crim. App. 1998).

The Alabama Supreme Court affirmed the appellate court decision. *Ex parte Mason*, 768 So.2d 1008, 1011-1012 (Ala. 2000).

> .... The petitioner ... complains that the trial court allowed the assistant prosecutor to argue, without objection by the defendant, that, "you must simply take,

because it has been held admissible, the information that the confidential informant provided, as a matter of law."

The informant's out-of-court declarations had been offered, without objection, for the dubious purpose of showing why the officer conducted his investigation and expressly not for the purpose of proving the truth of the matter stated. Likewise, the trial court had admitted this testimony expressly subject to these limitations. The out-of-court declarations would have been inadmissible hearsay for the truth of the matter stated. Rule 801 C; C. Gamble, McElroy's Alabama Evidence, § 242.01(2) (5th ed. 1996). Thus, to the extent that the assistant prosecutor's remarks can be construed as arguing the out-of-court declarations for the truth of the matter stated, the argument was improper.

. . . [T]he prosecutor's argument about them can [not] work a reversal, however, unless the defendant suffered enough prejudice to meet the standards of the plain-error rule. Rule 45, Ala. R.App. P. . . .

The defense may have intentionally allowed the admission of the out-of-court declarations of the informant in order to reap the mitigating benefit of the informant's statement that the defendant was "out of control." Indeed, at the sentencing phase, the defense did argue the sixth

statutory mitigating factor-that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." (Emphasis added.) Section 13A-5-51, Ala.Code 1975.

Moreover, rulings by the trial court either excluding the informant's out-of-court declarations or prohibiting the prosecutor's argument regarding the declarations could not have substantially increased the likelihood of either an acquittal or a life-without-parole recommendation. The State's evidence against the defendant was chiefly that the authorities had seized the murder weapon from the defendant's possession and that the defendant had given a detailed confession describing not only the murder itself but also the defendant's bizarre and cruel conduct culminating in the murder. Two police officers observed and heard the confession and recounted it to the jury with enough consistency to impart great credibility to their testimony and, indeed, just enough inconsistency in some details to prevent their testimony from being suspect as the product of improper collaboration. The out-of-court declarations by the informant pale into insignificance in comparison with this other damning evidence. Furthermore, the trial judge expressly instructed the jury not to consider the informant's out-of-court decla-

> rations for the truth of the matter stated. Thus we do not find prejudice that would warrant relief under the plain-error rule.

Ex parte Mason, 768 So.2d 1008, 1011-1012 (Ala. 2000).

The factual findings of the state court are presumed to be correct and Mason has offered no clear and convincing evidence to the contrary. As such, regardless of the propriety of the prosecutor's comments, Mason simply cannot establish he was prejudiced by them because the evidence against him was plenteous. For the foregoing reasons, Mason cannot establish that he is entitled to habeas relief. This claim is due to be denied.

3. **The prosecution improperly bolstered the testimony of the State's witnesses during the guilt phase.** (Doc. 17, ¶ 97 at 43).

Mason alleges the prosecutor improperly vouched for the credibility of Bud Parker when she said Parker had " 'interviewed and taken statements from numerous defendants' and had 'testified any number of times in a court of law which led to convictions of defendants based on those statements.' " (Doc. 17 at 43)(citing (R. 1440); *United States v. Hall*, 419 F.2d 582 (5th Cir. 1969); *Garza*, 608 F.2d at 666. Moreover, "there had been no reference at trial to Detective Parker's—or any other law enforcement officer's—record of convictions. . ." (Doc. 35 at 51).

Respondent answers that Mason cannot show the state courts' rejection of this claim on direct appeal was contrary to or an unreasonable appli-

cation of clearly established federal law or based upon an unreasonable interpretation of the facts in light of the evidence before it. (Doc. 24 at 34-36.)

The Alabama Supreme Court affirmed the Alabama Court of Criminal Appeals rejection of this claim, and added:

> [T]he petitioner complains that the trial court allowed the prosecutor to argue, without objection, in pertinent part:
>
> > "Whether or not any of these officers use a form, a waiver of rights form, is another smoke screen. Absolutely no bearing on this case. If you believe Officer Parker, Detective Parker, one of the most experienced homicide investigators we have got, one who has investigated hundreds of homicide cases in his career, who has interviewed and taken statements from numerous defendants, who has testified any number of times in a court of law which led to convictions of defendants based on those statements, if you don't believe what he told you that the defendant told him, so be it. But whether or not he used a form called a waiver of rights form has absolutely nothing to do with the truth of his testimony."
>
> The prosecutor's comments about the number of statements taken and the number of convictions obtained by Detective

> Parker in other cases were completely outside the record and were, accordingly, improper and objectionable. *Smith, supra; Brown, supra.* By this argument, the prosecutor sought to bolster the credibility of Detective Parker's testimony recounting the defendant's confession. As already discussed, however, Detective Parker's testimony about the confession had already been corroborated by the consistent testimony of another officer, Lisa Hamilton.[27] Moreover, as already discussed, the trial court instructed the jury, upon a number of occasions, that the arguments of counsel did not constitute evidence and the jurors should not consider counsel's arguments as evidence. Thus, here again, the improper argument does not warrant relief under the plain-error rule.

Ex parte Mason, 768 So.2d 1008, 1013 (Ala. 2000).

Mason is not entitled to habeas relief. While Mason offers case law to support his contention that the prosecutor's argument was improper, he never asserts in any fashion factual or legal arguments regarding an alleged prejudice. He offers nothing upon which to base a conclusion that the Alabama Supreme Court's well supported and well reasoned prejudice analysis is contrary to or an unreasonable application of clearly established federal law or an unreasonable determination of the facts in light of the evidence before it. This claim is due to be denied.

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[27] Lisa Hamilton also "observed and heard the confession and recounted it with enough consistency to impart great credibility to their testimony . ." (*Id* at 1012)

4. **The prosecution argued facts not in the record during both the guilt and penalty phases.** (Doc. 17, ¶¶ 98-102 at 43-46).

a. *Lack of fingerprint evidence.*

Mason alleges the prosecutor "attempted to explain a lack of fingerprint evidence by [improperly] referring to [statistical] facts that had not been established at trial, [in that she stated] without any authority or support in the record that police only find fingerprints in " 'one out of 20 or 25 cases.' " (Doc. 17,¶ 98 at (quoting (R. 1431) and citing *United States v. Childress*, 58 F.3d 693, 716 (D.C. Cir. 1995) for the proposition that "prosecutor's statement that drug operation was largest in history of District was improper where no evidence had been introduced to support that factual allegation.")).

The Alabama Supreme Court affirmed the Alabama Court of Criminal Appeals' rejection of this claim. Its opinion reads:

> The petitioner further complains that the trial court allowed the prosecutor to argue, without objection, and entirely outside the record, that identifiable fingerprints could be recovered in only "one out of twenty or twenty-five cases." The purpose of this argument was obviously to refute the defendant's argument that an absence of his identifiable fingerprints at the scene of the crime indicated that he had not been present. Of course, the prosecutor's resort to fingerprint statistics

> entirely outside the record was improper. Had the defendant objected, the trial judge would have been obliged to sustain the objection. *Smith v. State*, 588 So.2d 561 (Ala. Crim. App.1991); *Brown v. State*, 374 So.2d 391 (Ala.Crim.App.), *aff'd*, 374 So.2d 395 (Ala. 1979). Indeed, the trial judge did, on a number of occasions, instruct the jurors generally that the arguments of counsel did not constitute evidence and that the jurors should not consider the arguments as evidence.
>
> Here again, the question is whether the improper argument prejudiced the defendant enough to warrant relief under the plain-error rule. Without the prosecutor's fingerprint statistic argument outside the record, would the jurors have been substantially more likely to conclude that the absence of fingerprints identifiable as the defendant's at the scene of the crime exonerated him? His confession and his possession of the murder weapon eclipse any such likelihood.

Ex parte Mason, 768 So.2d 1008, 1013 (Ala. 2000).

Like his previous argument, Mason does not identify a factual construct or legal argument establishing prejudice, nor an argument that the state court's well supported and well reasoned prejudice analysis is contrary to or an unreasonable application of clearly established federal law or an unreasonable determination of the facts in light of the evidence before it. This claim is due to be denied.

b. *Dr. Embry's testimony regarding fingerprints.*

Next, Mason alleges the prosecutor referred to non-record facts to bolster state pathologist Joseph Embry's testimony when she argued:

> "What [Dr. Embry] said was 'We tried to lift prints off the body.' But I'll tell you that after reviewing the evidence, what they did was take that black powder and place it all over her body trying to lift prints and there were none."

(Doc. 17, ¶ 99 at 44 (quoting (R. 1344)).

Respondent answers that this claim is procedurally defaulted because it was not raised at trial, on appeal, or during post-conviction proceedings. (Doc. 24 at 38) (citing *Teague v. Lane*, 489 U.S. 288, 297-98 (1989); *Engle v. Isaac*, 456 U.S. 107, 113-114, 117, 124-125 (1982). A review of the record shows that respondent is correct. Since Mason was required to but failed to afford the state courts an opportunity to address this claim to such an extent that the state's procedural rules prevent any further presentation of it, it is procedurally defaulted.

c. *Arguing that defendant tried to rape the victim.*

Mason alleges that the prosecutor "improperly argued that [he] tried to rape the victim, without any evidence in the record whatsoever to support this position, [because she stated] 'Do I think he raped her? I don't know. But what I do think is that he at least tried.'" (Doc. 17, ¶ 100 at 44 (quoting R. 1347-48)). He then argues that "[a]ny ref-

erence to non-record information during closing is error." (*Id.*)(citing *Berger v. United States*, 295 U.S. 78, 84-85 (1935)). He contends this is "particularly true where the improper argument acts to arouse the passions of the jury, such as the allegations of sexual assault . . . when the issue of race is interjected[.]"

Respondent contends that Mason cannot show he is entitled to 2254(d) relief from the decision of Alabama Court of Criminal Appeals on direct appeal. (Doc. 24 at 39-40). That opinion reads:

We find no error in the portion of the prosecutor's argument where she stated that the appellant might have tried to rape the victim. The prosecutor argued:

> "Do I think he raped her? I don't know. But what I do think is that he at least tried. There is no other explanation for having this woman be so completely humiliated with all of her clothes off. There is no other explanation for the pubic hair consistent with hers in his [sic]. There is, to me, some indication that it occurred by virtue of the fact that here on her upper left leg was a bruise, that on this left leg were found some fibers of clothing not consistent with his [sic]. I will always believe that as she sat there on that desk trying to protect her virtue, he tried to pry her legs apart, perhaps with his elbow, causing this bruise, rubbed up against her perhaps causing the fibers on her left leg, and that as he tried to make entry he left that pubic hair in hers."

> (R. 1347-1348.) When the victim was found, she was wearing only her socks, she had a fresh bruise on her inner thigh, and a negroid pubic hair consistent with the appellant's was found in her pubic hair. In addition, material fibers not consistent with her clothing were found on her inner thigh. Testimony established that the fibers could have been deposited on the victim by someone rubbing against her. There was evidence that the victim's shirt had been forcibly removed from her body. Furthermore, the appellant admitted to the police that he forced the victim to remove the rest of her clothes. Accordingly, we conclude that the prosecution's argument is a legitimate inference from the evidence presented.

Mason v. State, 768 So.2d 981, 989-990 (Ala. Crim. App. 1998).

The state court's findings of fact are entitled to a presumption of correctness, and Mason's blanket assertion that there was no evidence to support the prosecutor's sexual assault argument does not begin to provide the clear and convincing evidence required to overcome the presumption. The prosecutor's argument was a legitimate inference from the evidence. Moreover, the race of the perpetrator was material, and the sexual overtones of the crime were apparent. Neither fact was afforded an underlying inflammatory emphasis by the prosecutor. This claim is due to be denied.

d. *Misstating Dr. Embry's testimony regarding the first and second bullets.*

Mason next argues that "during the sentencing phase, the prosecutor erroneously stated that Dr. Embry testified " 'that the first shot Ms. Cagle received entered the left cheek, exited the back of the left - behind the ear.' In fact, Dr. Embry testified that he could not tell which of the two bullet wounds occurred first, or which wound killed Ms. Cagle. (R. 1074)." (Doc. 17, ¶ 101 at 45) (quoting (R. 1605 and 1074 respectively). Mason argues that this statement was especially prejudicial to jury and judge because it was used to argue that the killing was heinous, atrocious, or cruel, and the trial judge used the mischaracterization in finding that the murder was indeed heinous, atrocious, or cruel. (R. 1605-16). (*Id.* at 45).

Respondent answers that this claim is procedurally defaulted because it was not raised at trial, on appeal, or during post-conviction proceedings. (Doc. 24 at 41) (citing *Teague v. Lane*, 489 U.S. 288, 297-98 (1989); *Engle v. Isaac*, 456 U.S. 107, 113-114, 117, 124-125 (1982). A review of the record shows that respondent is correct. Since Mason was required to but failed to afford the state courts an opportunity to address this claim to such an extent that the state's procedural rules prevent any further presentation of it, it is procedurally defaulted.

e. *Prosecutor stated Mason wanted to write a book.*

Mason alleges that, at sentencing, the prosecutor inflamed the jury with facts not in evidence by

arguing "'[a]nd like all of the modern day criminals, he wants to write a book, wants to profit from what's happened to him and the horror and the tragedy he has inflicted on another family, including his own family." (Doc. 17 at 45)(quoting R. 1629). Mason asserts there was no evidence he intended to write such a book.

Respondent answers that this claim is procedurally defaulted because it was not raised at trial, on appeal, or during post-conviction proceedings. (Doc. 24 at 41) (citing *Teague v. Lane*, 489 U.S. 288, 297-98 (1989); *Engle v. Isaac*, 456 U.S. 107, 113-114, 117, 124-125 (1982). A review of the record shows that respondent is correct. Since Mason was required to but failed to afford the state courts an opportunity to address this claim to such an extent that the state's procedural rules prevent any further presentation of it, it is procedurally defaulted.

5. The prosecution improperly stated personal opinions during guilt phase. (Doc. 17, ¶¶ 103-105 at 46-47).

Mason alleges that the prosecutor made arguments concerning her personal opinion, and argues that "personal beliefs are always improper because the beliefs are based on non-record information, which is always error." (Doc. 17 at 46)(citing *Berger*, 295 U.S. 84-5). The statements read:[28]:

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[28] Mason claims the prosecutor expressed her personal beliefs "[o]n at least fourteen different occasions," and places record citations in footnote Such citations to the record fails to satisfy the heightened pleading requirements for habeas proceedings and, as such, only those comments Mason has set out in full shall be examined.

a. "I believe . . . that he went to the store earlier, bought some gas, checked it out, saw her, determined she was alone, came back and parked his car on this side, the darkest side, entered this store with the intent to rob, takes her in the back room." (R. 1339).

b. "I believe that as he held the gun over her a second time, because he didn't want to leave any witnesses, didn't want anyone to identify him, as he shot her at close range the second time in the right side of her check, the projectile flew out and landed here in this box." (R. 1340).

c. "Do I think he raped her? I don't know. But what I do think is that he at least tried." (R. 1347-48).

d. " I will always believe that as she sat there on that desk trying to protect her virtue, he tried to pry her legs apart, perhaps with his elbow, causing this bruise, rubbed up against her perhaps causing the fibers on her left leg,[29] and that as he tried to make entry he left that pubic hair in hers." (R. 1348).

e. ["]I believe that as they got into the back room, and there were no cameras, that perhaps he decided maybe I will have a little fun here. I believe that before any of the sexual activity, if any occurred, happened, that he did step outside to see if any cars had stopped for gas.["] (R. 1348-49).

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[29] At this juncture, Mason placed footnote 5, which reads. "The fibers had been ruled inadmissible."

The last court to address this claim on direct appeal was the Alabama Supreme Court. Its opinion reads:

> In arguing to the jury, the assistant prosecutor prefaced many of her statements with such expressions as "I believe" and "I think," without objection by the defense. The petitioner now argues that the assistant prosecutor was thereby arguing matters outside the record. Because the substance of the assistant prosecutor's statements was supported by evidence introduced during the trial, the comments were not objectionable as references to matters outside the record. Such first-person prefaces as "I believe" and "I think" should, however, be avoided inasmuch as they may be construed as the advocate's personal voucher for the truth of the evidence, an improper practice. *See Woods v. State*, 19 Ala.App. 299, 97 So. 179 (1923), rev'd on other grounds, 20 Ala.App. 200, 101 So. 314 (1924), aff'd, 21 Ala.App. 436, 109 So. 171 (1926); and *Arthur v. State*, 575 So.2d 1165 (Ala. Crim. App.1990). *But see Williams v. State*, 710 So.2d 1276 (Ala. Crim. App.1996), aff'd, 710 So.2d 1350, cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998); and *Coral v. State*, 628 So.2d 988 (Ala. Crim. App.1992), aff'd, 628 So.2d 1004 (Ala.1993), cert. denied, 511 U.S. 1012, 114 S.Ct. 1387, 128 L.Ed.2d 61 (1994).

> In the particular case before us, the assistant prosecutor's continual use of these first-person prefaces tends to diminish the force of her argument rather than to increase it. The evidence in this case was so emotionally compelling that its impact would have been greater had it been argued as established fact instead of personal belief. Thus, in the context of the particular facts of this case, the use of these first-person prefaces did not prejudice the defendant, much less prejudice him enough to entitle him to relief under the plain-error rule. *See e.g. Williams, supra; Ex parte Rieber*, 663 So.2d 999 (Ala.1995), cert. denied, 516 U.S. 995, 116 S.Ct. 531, 133 L.Ed.2d 437 (1995); and *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

Ex parte Mason ,768 So.2d 1008, 1011 (Ala. 2000).

The factual findings made by the Alabama Supreme Court regarding the evidence presented at trial are entitled to a presumption of correctness. Mason has provided no clear and convincing evidence to overcome that presumption. Thus, the evidence of Mason's guilt, as set out in this portion of the appellate court's opinion and that court's findings of fact surrounding the crime itself, will be afforded appropriate deference. Since the trial court found the prosecutor's beliefs were reasonable inferences from the evidence, Mason cannot establish that her attachment of the words "belief" or "think" were improper. More importantly, the appellate court found that, regardless of the prosecutor's verbal thought pro-

cesses, the facts of the case showed that Mason was not prejudiced by the remarks.

Mason has not shown he is entitled to habeas relief from the state court's merit review of the case. This claim is due to be denied.

6. The prosecution misstated the roles of both the prosecution and the jury during both the guilt and penalty phases. (Doc. 17, ¶¶ 106-108 at 47-48).

In this argument, Mason repeats his complaint regarding District Attorney Morgan's assertion that the prosecutor serves a "dual function," a claim that has already been addressed as part of Claim E.1. (Doc. 17 at 47). Mason also points out six areas of the prosecutor's argument pertaining to the advisory nature of the jury sentencing verdict. (*Id.*)(quoting (R. 1621-30)). Thereafter, he simply concedes each argument "is a technically correct statement of the law," and asserts "the United States Supreme Court has condemned arguments that diminish the jury's sense of responsibility in the sentencing phase of a capital murder trial." (*Id.*) (citing *Caldwell v. Mississippi*, 472 U.S. 320, 328-39 (1985).

As Mason has conceded here that the prosecutor's statements were legally correct, the court does not set out the Alabama Court of Criminal Appeals' rejection of the claim in full. *See Mason v. State*, 768 So.2d at 996-997. Instead, only that portion of the Alabama Court of Criminal Appeals' opinion pertaining to the context of the prosecutor's arguments is addressed. The appellate court found that the district attorney's instruction was a reply to defense counsel's suggestion "several

times that the jury had the ultimate authority to determine whether [Mason] lived or died." (*Id.* at 996). Mason does not dispute this factual finding. In light of the fact that Mason concedes the prosecutor's advisory comments were a proper statement of the law and does not dispute defense counsel argued otherwise (which could mislead the jury) in its closing, he cannot establish impropriety, much less prejudice. This claim is due to be denied.

7. **The prosecution engaged in other misconduct and errors throughout petitioner's trial and appeal.** (Doc. 17, ¶¶ 109-110 at 48-49).

This underlying allegations in support of this claim were raised for the first time during post-conviction proceedings.[30] Mason failed to timely appeal from the Rule 32 court's rejection of the claim on collateral appeal. As such, this claim is procedurally defaulted.

8. **Prosecutorial misconduct and error: Conclusion**. (Doc. 17, ¶¶ 111-117, pp. 49-51).

Although some of the reviewable[31] comments made by the prosecutors in Mason's case during the guilt phase of trial were improper, none, either individually or collectively, are such that Mason's fundamental right to a fair trial was vio-

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[30] *See* (Rule 32 C.R. Vol 14, Tab 41 at 22)

[31] Meaning the prosecutorial misconduct claims that are not found to be procedurally defaulted in this opinion

lated.[32] The evidence of Mason's guilt was overwhelming, and there is no reasonable probability that the jury would have acquitted Mason of the offense if the improper comments had been the subject of an objection. Mason does not explain how the prosecutor's "dual function" argument, made at the guilt phase of trial, rendered the penalty phase of the trial fundamentally unfair. This claim is due to be denied.

F. The prosecution struck potential jurors solely on the basis of their race in violation of the Sixth, Eighth and Fourteenth Amendments. (Doc. 17, ¶¶ 118-124 at 52-53).

This claim is similar to its Rule 32 predecessor[33] Mason alleges that, during voir dire, the prosecution utilized its peremptory challenges to strike African-Americans and women in a discriminatory manner. (Doc. 17 at 52-53)(citing *Batson v. Kentucky*, 476 U.S. [79,] 84 (1986); *Powers v. Ohio*, 499 U.S. 400, 404 (1991); *J.E.B. v. Alabama*, 511 U.S. 127, 128 (1994)). The post-conviction court addressed the issue as follows:

> [Mason] contends that the prosecution used peremptory challenges during the striking of his jury in a discriminatory manner based on race and gender. The Court finds that the allegation of racial discrimination by the State during voir dire . . . is procedurally barred from review because it was raised and

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[32] Those comments that are procedurally defaulted are immaterial and irrelevant to the court's analysis.

[33] (*See* Rule 32 C.R Vol. 14, Tab. 41 at 19-20).

> addressed at trial and because it could have been but was not raised on appeal. (R. 656). Rules 32.2(a)(2) and (5) ARCrP. The Court further finds that the allegation of gender discrimination during voir dire is procedurally barred because it could have been but was not raised at trial and could have been but was not raised on appeal. Rules 32.2(a)(3) and (5) ARCrP. Therefore, these allegations are hereby summarily dismissed.

(Rule 32 C.R. Vol. 16, Tab. 55 at 60).

Mason does not dispute that he failed to timely appeal the denial of this post-conviction claim to the Alabama Court of Criminal Appeals. (Doc. 35 at 40-41). Nor does he deny that he never presented a *J.E.B* claim on direct appeal. (*Id.*). Accordingly, Mason's *J.E.B.* claim is procedurally defaulted.

However, he contends that the *Batson* claim is not procedurally defaulted because his "appellate counsel . . . listed the overruled *Batson* objections in the appellate briefs to the Alabama Court of Criminal Appeals and the Alabama Supreme Court." (*Id.*). In essence, Mason argues that the Rule 32 court's denial of the *Batson* claim and his own failure to execute a timely collateral appeal of that decision is irrelevant because he presented the *Batson* claim in the direct appeal process. He contends he was not required to raise the question during the postconviction process in order to preserve it for federal review. Had Mason actually raised such a claim on direct appeal, his argument would have merit. However, Mason clearly misrepresents the record. Nowhere in any brief or

materials presented on direct appeal did Mason raise a *Batson* claim. He simply attached a document entitled "List of Adverse Trial Court Rulings to the Briefs", seven of which read: "Overruled *Batson* challenge" and a page citation to the trial record.[34] Additionally, Mason at no point complained that he was raising such a claim and the state court had overlooked the effort. Contrary to the misleading assertion made here, Mason did not present a *Batson* claim to the state court during the direct appeal process. He is bound by the postconviction court's dismissal of the claim on collateral review.

For the foregoing reasons, this court expressly finds that Mason's *Batson/J.E.B.* claims are procedurally defaulted. He was required to but failed to raise the claims at trial and/or on direct appeal in accordance with state procedural rules, and the Rule 32 trial court dismissed the claims based on those failures. Moreover, his appeal from the postconviction dismissal of the claims was found to be untimely by the Alabama Court of Criminal Appeals, resulting in an additional procedural default.

Mason does assert that, even if this court finds his *Batson* claim to be procedurally defaulted, he can overcome that default because his trial counsel were ineffective for "fail[ing] to preserve the record and litigate the *Batson* claims." (Doc. 35 at 42). As an alternate stance, Mason argues "if the Court finds a default due to the actions of appellate counsel, this too can constitute cause." (*Id.*).

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[34] (*See generally*, R Vols. 12 and 13) for the attachments to Mason's briefs in support of his direct appeal, application for rehearing, and petition for writ of certiorari

However, a claim of ineffective assistance must be both exhausted *and* not defaulted in state court before it can be asserted as cause. *Hill v. Jones*, 81 F.3d 1015, 1030-31 (11th Cir. 1996). If the ineffective assistance claim is defaulted, then a petitioner must demonstrate independent cause and prejudice excusing the default of the ineffectiveness claim before that claim can be asserted as cause in relation to a second, substantive claim. (*Id.*).

Mason cannot assert the alleged ineffectiveness of trial counsel as cause to overcome the procedural default of this claim because, as noted earlier in this discussion (*see supra* Claim G), the ineffectiveness claim is itself procedurally defaulted. Mason never raised a claim of ineffective appellate counsel as to this issue at any time during direct or collateral review.[35] For the foregoing reasons, both Sixth Amendment ineffectiveness claims are procedurally barred. A procedurally defaulted ineffectiveness claim cannot provide the cause and prejudice necessary to overcome the procedural default of Mason's *Batson* claim. Accordingly, the *Batson/J.E.B.* claims are procedurally defaulted.

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[35] (*See* Vol 14, Tab 41 at 17-18).

G. Ineffective Assistance of Counsel.[36] (Doc. 17, ¶¶ 125-164 at 53-72).

As a prefatory matter it must be observed that all but a handful[37] of the subclaims in Mason's habeas petition were initially raised in his Rule 32 petition, the denial of which Mason failed to timely appeal as expressly required by Alabama law. The Alabama Court of Criminal Appeals' dismissed the notice of appeal on the grounds of untimeliness. Thus, the following claims are procedurally defaulted for federal review purposes:

1. **Trial counsel failed to conduct an adequate and independent investigation of the State's capital murder charge against petitioner.** (Doc. 17, ¶¶ 133-137 at 57-59).

2. **Trial counsel abdicated their responsibility during voir dire.** (Doc. 17, ¶¶ 138143 at 59-61).

3. **Trial counsel failed to adequately challenge the State's investigation and presentation of the case.** (Doc. 17, ¶¶ 144-146, 148 at 61-63).

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[36] Mason actually titles this claim as "The above errors were exacerbated by the ineffective assistance of trial counsel." Such a title cannot satisfy Mason's burden to sufficiently plead an independent ineffectiveness claim. As such, only the allegations of ineffective counsel specifically pleaded within the body of Claim G shall be considered.

[37] ¶¶ 147, 149-151, 153-154

4. **Trial counsel failed to object to a number of objectionable occurrences.** (Doc. 17, ¶¶ 152 at 64-66).

5. **Trial counsel failed to adequately investigate, prepare for and present evidence during the sentencing phase.** (Doc. 17, ¶¶ 155-161, at 66-71).

   a. **Background and mental health history as mitigating evidence.** (Doc. 17, ¶¶ 160(a) at 69).

   b. **Failure to show petitioner's mother used drugs and alcohol during pregnancy.** (Doc. 17, ¶¶ 160(b) at 69).

   c. **Failure to present evidence petitioner had attention deficit disorder and saw a psychologist on several occasions.** (Doc. 17, ¶¶ 160(c) at 69).

   d. **Failure to present social history experts.** (Doc. 17, ¶¶ 160(d) at 69-70).

   e. **Failure to present evidence of petitioner's involuntary intoxication.** (Doc. 17, ¶¶ 160(e) at 70).

   f. **Failure to present expert to testify as to effect of petitioner's involuntary intoxication.** (Doc. 17, ¶¶ 160(f) at 70).

g. **Failure to interview and present other witnesses who would have offered substantial mitigating testimony.** (Doc. 17, ¶¶ 160(g) at 70-71).

6. **Failure to present, adequately argue and obtain favorable ruling on errors during the sentencing phase.** (Doc. 17, ¶¶ 162-164 at 71-72).

The remainder of the omnibus ineffectiveness sub-claims (¶¶ 147, 149-151, 153-154) are subject to 28 U.S.C. ¶ 2254(d) review because they were raised by appellate counsel in a motion for new trial and/or on direct appeal, and the Alabama Court of Criminal Appeals conducted a merits review of the claims.[38]

Since the appellate court's opinion addressed the claims collectively, it is appropriate to do so here. The allegations in support of the sub-claims are:

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[38] The habeas paragraphs being examined in this opinion comport with a version of Mason's entire ineffectiveness claim on direct appeal. *See* (Claim IX. A-E at C.R Vol. 12, Tab 34 at 27). Although the Alabama Court of Criminal Appeals noted that Mason did not present all of the ineffectiveness claims in his motion for new trial, it acknowledged its obligation to conduct a plain error review. *See Mason v. State*, 768 So 2d 981, 1005 (Ala. Crim. App 1998).

- ¶¶ 147, 151. **Trial counsel failed to object to statements of the confidential informant and the trial court's limiting instruction regarding the admissibility of same as a violation of the Confrontation Clause.**

  Trial counsel also failed to object to the confidential informant's statements on hearsay grounds.

Mason contends trial counsel were ineffective for failing to object to Detective Renfroe's testimony regarding the confidential informant on the grounds that it violated his Sixth and Fourteenth Amendment constitutional rights, and on the ground the statements were "clearly hearsay." (Doc. 17 at 63). Nor did counsel object to the court's instruction limiting the purpose for which the hearsay statements were purportedly being admitted. (*Id.* at 63).

- ¶¶ 149. **Trial counsel failed to object to improper argument at the guilt and phase of trial.**

Mason alleges counsel failed to object to the prosecutor's improper arguments at the guilt phase of trial, and as his only support therefore he simply writes, "As discussed above, the prosecution was allowed to argue its personal opinions about the evidence, to argue non-record matters, and to improperly vouch for the State's witnesses. (*Id.*)(quoting *United States v. Wolf*, 787 F.2d 1094, 1099-1100).

- **¶¶ 150. Trial counsel failed to object to improper argument at the penalty phase of trial.**

At the penalty phase of trial, Mason complains trial counsel failed to object to the prosecutor's repetitious argument that the jury's verdict was advisory in nature. (*Id.*) (citing *Caldwell*, 472 U.S. 320, and *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1998)).

- **¶ 153. Trial counsel was ineffective for stipulating to the admission of evidence.**

Mason alleges that trial counsel "imprudently agreed to stipulate to the admissibility of certain items of evidence[,]" and supports it by complaining that counsel agreed not to challenge the chain of custody "with respect to both items Investigator Glenn Nunley touched or helped bag and the transportation" of the victim's body by the coroner. (Doc. 17 at 65) (citing R. 1316-1318).

- **¶ 154. Trial counsel failed to object to the heinous, atrocious, or cruel instruction.**

This claim reads in its entirety, "Finally, trial counsel failed to object to the jury charge regarding the aggravating circumstance that the crime was especially heinous, atrocious or cruel. As discussed above, there was no evidence in the record to support this charge." (Doc. 17 at 66).

On collateral appeal, the Alabama Court of Criminal Appeals made the following findings of fact and conclusions of law in connection with the above claims:

Pursuant to the procedure outlined in *Ex parte Jackson*, 598 So.2d 895 (Ala.1992), [footnote omitted] appellate counsel filed a motion for a new trial, in which counsel asserted, in very general terms, that the appellant had received ineffective assistance of trial counsel.[FN6] A hearing was conducted on the motion. During the hearing, appellate counsel advanced several of the above grounds in support of the appellant's contention that his trial counsel had been ineffective; however, neither the appellant nor his trial attorneys testified at the hearing. The trial court denied the appellant's motion for a new trial.

> FN6. The appellant was represented by different counsel at trial and on appeal.

Although the appellant did not present all of the above allegations of ineffective assistance of counsel to the trial court, this Court is obliged to review the appellant's allegations pursuant to the plain error doctrine. Rule 45A, Ala.R.App.P.

> "In order to prevail on an ineffective assistance of counsel's claim, a defendant must meet the two-pronged test set out by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
>
> "'First, the defendant must show that counsel's perfor-

> mance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.'

"*Id.* at 687, 104 S.Ct. 2052.

> " 'The performance component outlined in *Strickland* is an objective one: that is, whether counsel's assistance, judged under "prevailing professional norms," was "reasonable considering all the circumstances." ' *Daniels v. State*, 650 So.2d 544, 552 (Ala. Cr. App.1994) (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052). Once a defendant has identified the specific acts or omissions that allegedly

> were not the result of reasonable professional judgment on counsel's part, the court must determine whether those acts or omissions fall outside the wide range of professionally competent assistance. *Id.*

"When reviewing a claim of ineffective assistance of counsel, we indulge a strong presumption that counsel's conduct was appropriate and reasonable. *Hallford v. State*, 629 So.2d 6 (Ala. Cr. App.1992), cert. denied, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 491 (1994); *Luke v. State*, 484 So.2d 531 (Ala. Cr. App.1985).

> "'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circum-

> stances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'

"*Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 (citations omitted). *See Ex parte Lawley*, 512 So.2d 1370, 1372 (Ala.1987).

"And, even if an attorney's performance is determined to be deficient, the petitioner is not entitled to relief unless it is also established that 'there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a

> probability sufficient to undermine confidence in the outcome.' *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.
>
> "In an ineffective assistance of counsel claim, the burden is on the claimant to show that his counsel's assistance was ineffective. *Ex parte Baldwin*, 456 So.2d 129 (Ala.1984), aff'd, 472 U.S. 372, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985)."

McNair v. State, 706 So.2d 828 (Ala. Cr. App.1997).

The appellant has met neither prong of the *Strickland* test. First, the appellant has not demonstrated that his trial counsel's performance was deficient. As noted, neither the appellant nor his trial attorneys testified at the hearing. The arguments of the appellant's counsel in support of the motion for a new trial are not evidence. *Arnold v. State*, 601 So.2d 145, 154 (Ala. Cr. App.1992). Without more, it is impossible to determine trial counsel's rationale for not objecting to the allegedly improper conduct or comments. Accordingly, the appellant has not "'overcome the presumption that, under the circumstances, [counsel's actions] "might be considered sound trial strategy."'" *McNair*, 706 So.2d at 839, quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

> Even if we were to assume for the sake of argument that counsel's performance was deficient, the appellant has not proven that he was prejudiced by counsel's performance. All of the claims underlying the appellant's allegations of ineffective assistance of counsel-with the exception of the claim "D" above-have been addressed elsewhere in this opinion and found to be without merit.[39] Accord-

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[39] The state court did not specifically address the Confrontation Clause issue as substantive matter on direct appeal This court's findings are the same whether the ineffectiveness claim is examined *de novo* or pursuant to 2254(d)

The court recognizes that the Alabama Supreme Court engaged in discussion regarding the issues surrounding the confidential informant's statements as hearsay, the prosecutor's comment on the statements during closing, and the performance of counsel that somewhat differed from the Alabama Court of Criminal Appeals with regard to the substantive issues. *See Ex parte Mason*, 768 So.2d 1008, 1011-1012. (Ala 2000) Nonetheless, that Court also found that even if there had been "rulings by the trial court" excluding the confidential informant's statement or the prosecutor's argument, such a turn of events "could not have substantially increased the likelihood of either an acquittal or a life-without-parole sentence based upon the evidence of guilt against Mason and the cruelty of the murder (*Id.* at 1012).

The Alabama Supreme Court also disagreed with the Alabama Court of Criminal Appeals in that it found two prosecutorial comments to be improper (*i.e.* District Attorney Morgan's 'dual function argument, comments regarding fingerprint statistics, and argument concerning Detective Parker's experience taking statements and conviction success rate) because the dual function argument was a misstatement of the law and the remaining were not supported

ingly, the appellant has failed to prove that " 'there is a reasonable probability that, but for [counsel's failure to object], the result of the proceeding would have been different.' " *McNair*, 706 So.2d at 839, quoting *Strickland,* 466 U.S at 694, 104 S.Ct. 2052.

In support of the appellant's allegation that his trial attorneys were ineffective for stipulating to the admissibility of certain evidence, the appellant refers this Court to a portion of the record in which counsel agreed to stipulate to the chain of custody on items of evidence which Investigator Glen Nunley "touched or helped bag." (R. 1317.) In that portion of the record, counsel also stipulated that it was not necessary to have the contract driver for the Department of Forensic Sciences, who transported the victim's body to and from the autopsy, testify as a chain of custody witness, and counsel stipulated to the identity of the deceased. Other than his broad assertion that there is no evidence that he agreed to the stipulations, and that any such stipulations should be considered ineffective assistance "as a matter of law" (Appellant's brief, p. 29), the appellant does not demonstrate how counsel's stipulations constituted ineffective assistance. Again, the appellant has failed to overcome the presumption

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by the evidence (*Id* at 1012-13) Nonetheless,the Alabama Supreme Court still determined the improper statements were not so prejudicial as to rise to plain error (*Id*)

> that counsel's conduct fell "'within the wide range of reasonable professional assistance.'" *McNair*, 706 So.2d at 839, quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Moreover, the appellant does not even say how he was prejudiced by counsel's stipulations, and any prejudice suffered as a result of counsel's stipulations is not apparent to this Court.
>
> Because the appellant has met neither prong of the test set forth in *Strickland*, he is due no relief on his allegations of ineffective assistance of counsel.

Mason v. State, 768 So.2d 981, 1005 -1007 (Ala. Crim. App. 1998).

Mason contends that the state court's "summary conclusion that trial counsel's performance must have been sound trial strategy because neither Mr. Mason nor trial counsel testified at a hearing [on the motion for new trial], constitutes an unreasonable application of *Strickland*." (Doc. 35 at 188). Mason also declares there is no controlling authority that require trial counsel's testimony to prove ineffectiveness or that a defendant waive his Fifth Amendment rights on direct appeal to testify in support of an ineffectiveness claim. (*Id.*).

The state court did not decide counsel's actions *must* have been reasonable trial strategy. Its decision placed emphasis on Mason's failure overcome the *presumption* that counsel's conduct *might have been* sound trial strategy. Post-conviction counsel had ample opportunity to cross-examine trial counsel for purposes of determining whether their

failure to object was the result of no strategy, or to show the strategy was unreasonable, but failed to do so. While this court cannot detect what, if any, testimony Mason could have proffered at the evidentiary hearing regarding these particular ineffectiveness claims that would have effected the outcome, nor does this court agree that in all instances, a defendant's testimonial support of his ineffectiveness claim necessarily waives his Fifth Amendment right against self-incrimination, Mason is correct in his contention that the testimony of counsel or the defendant is not mandatory in support of all ineffectiveness claims. Notwithstanding that legal truism, this court cannot conclude that under the facts of this case Mason can begin to satisfy his burden by arguing there "cannot" be any reasonable strategy for counsel to fail to object to issues surrounding the confidential informant's statements. (*Id.* at 118). Nor can this court find that the state court's determination that Mason was not prejudiced by the comments or the prosecutor's argument is an unreasonable application of *Strickland* simply because Mason asserts that in his opinion the prejudice is "indisputable." (*Id.* at 118-119). It is in fact disputed. The Alabama Supreme Court said he was not prejudiced. He does not carry his burden merely by repeating that he thinks he was.

Mason next argues that "[like his argument concerning strategy and the confrontation clause/hearsay issues], defense counsel's failure to object to the prosecution's misstatements of law, improper bolstering of law enforcement testimony, unfounded allegations that Mr. Mason had tried to rape the victim and inflammatory statement that

he intended to profit from the crime by writing a book, "cannot be considered reasonable trial strategy" and erroneously argues that the Alabama Supreme Court "already found that such conduct was improper." (*Id.* at 119)(citing 768 So.2d at 1011-13).

The Alabama Supreme Court did diverge from the Alabama Court of Criminal Appeals when the Supreme Court found three prosecutorial comments to be improper (*i.e.* District Attorney Morgan's "dual function" argument, comments regarding fingerprint statistics, and argument concerning Detective Parker's experience taking statements and conviction success rate) because the dual function argument was a misstatement of the law and the remaining were not supported by the evidence. (*Id.* at 1012-13). However, the Alabama Supreme Court nonetheless determined the improper statements were not so prejudicial as to rise to plain error. (*Id.*). The state supreme court did not mention the rape comment, and the book comment was never presented in any fashion to the state court.

Finally, Mason makes no effort to dispute the state court's rejection of his ineffectiveness claim pertaining to stipulations to certain evidence at trial.

For the foregoing reasons, this court finds that Mason has not shown that the state court's review of these claims is an unreasonable application of either prong of the *Strickland* standard or an unreasonable determination of the facts in light of the evidence before it. This claim is due to be denied.

H. Petitioner's sentence of death is unconstitutional because it was sought and imposed pursuant to a pattern of racial bias in imposition of the death penalty. (Doc. 17, ¶¶ 165-168 at 72-73).

When Mason raised this claim in his Rule 32 petition, the post-conviction court held "this allegation is procedurally barred from review because it could have been but was not raised at trial because it was raised [sic] on appeal. Rules 32.2(a)(3) and (4), ARCrP. *Mason v. State*, 768 So.2d at 1008."[40] A review of the entire record on direct appeal and the page citation to the Alabama Court of Criminal Appeals' opinion shows that the Rule 32 court erred to the extent it found the above claim was raised and addressed on appeal.[41] In fact, Mason raised no semblance of this claim on direct appeal nor did the appellate court opinion address it. The claim's appearance in the Rule 32 petition marked the first time it had been raised in state court proceedings.

Mason's collateral appeal from the rejection of the claim was dismissed as untimely filed by the Alabama Court of Criminal Appeals.[42] Mason's failure to raise the claim at any stage of the state

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[40] (Rule 32 C.R. Vol 16, Tab 55 at 62-63).

[41] Thus, although respondent is incorrect in answering (doc 24) that the post-conviction court found the claim to be procedurally barred pursuant to ALA.R.CRIM P 32 2(a)(3) and (5), it is true that Mason failed to raise the claim at trial or on appeal

[42] *Mason v. State*, Memorandum Opinion, CR-04-2394, ___ So 2d ___ (Ala. Crim App 2005). (Rule 32 C.R Vol 16, Tab 56).

court direct appeal process as required pursuant to state procedural rules, together with his failure to timely appeal from the post-conviction court's dismissal of the claim, renders the issue procedurally barred from federal review. It is due to be dismissed.

I. Imposition of death penalty in petitioner's case is disproportionate under State and Federal law. (Doc. 17, ¶¶ 169-171at 73-74).

In his petition, Mason alleges that by statute[43], "Alabama appellate courts must independently review whether the imposition of the death penalty constitutes a disproportionate penalty based on the crime, the defendant and in comparison to similar cases." (Doc. 17 at 73-74).[44] He then concludes, without illustration or explanation, that a sentence of death in his case is unconstitutional under the Eighth and Fourteenth Amendments because "other crimes for which the death penalty has been imposed [in Alabama]. . . involve a level of violence and cruelty that is far beyond" that exhibited in his case. (*Id.*).

In his reply brief, Mason again fails to provide support for his "other crimes" argument. (Doc. 35

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[43] ALA. CODE § 13A-5-53(b)(3)

[44] In his petition, Mason also acknowledges that the Alabama Court of Criminal Appeals conducted sucha review, but declares the Alabama Supreme Court failed to do so and, as such, his "constitutional right to due process" was violated (*Id.* at 74). However, in his reply brief, Mason changes his position by conceding "the postconviction court found that the state supreme court had" conducted such an analysis "as well." (Doc. 35 at 121).

at 121). Instead, he alleges the state courts' "proportionality analysis" was "contrary to, or involved an unreasonable application of, clearly established federal law[,]" thus depriving him of due process. (*Id.* at 121-22). Mason supports this contention by repeating that the crime was not heinous, atrocious, or cruel. (*Id.* at 121). From this premise, Mason contends that no reasonable jury, judge, or appellate court would have upheld his death sentence based on the one remaining statutory aggravator (murder during the course of a robbery), the two statutory mitigators (being 19 at the time of the crime and having no criminal record), the evidence of his difficult childhood, and evidence his ineffective trial counsel purportedly failed to present *i.e.*, "sexual abuse as a child, that he was goaded into committing the crime by Quincy, that he was involuntarily intoxicated, and other mitigating evidence . . . not fully before the jury.") (*Id.* at 121).

The claim is without merit. Mason's arguments regarding the HAC aggravator are without merit and his ineffective assistance of counsel claim as described above is procedurally defaulted. (*See supra*, Claims D.5 and E.5).

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus filed by Derrick O'Neal Mason, along with his requests for discovery and an evidentiary hearing (docs. 17 and 35) are due to be **DENIED**. A separate order shall be entered contemporaneously herewith.

DONE on this the 3rd day of March, 2009.

/s/ VE HOPKINS
VIRGINIA EMERSON HOPKINS
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-12195-P

August 23, 2010

DERRICK O'NEAL MASON,

Petitioner-Appellant,

—versus—

RICHARD F. ALLEN, Commissioner,
Alabama Department of Corrections,

Respondent-Appellee.

On Appeal from the United States District
Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before:

DUBINA, *Chief Judge*,
BARKETT and MARCUS, *Circuit Judges*.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ ROSEMARY BARKETT
UNITED STATES CIRCUIT JUDGE

28 U.S.C.A. § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

> **(A)** the applicant has exhausted the remedies available in the courts of the State; or
>
> **(B)(i)** there is an absence of available State corrective process; or
>
> **(ii)** circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by *section 3006A of title 18.*

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

U.S.C.A. Const. Amend. IV

Amendment IV. Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S.C.A. Const. Amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.C.A. Const. Amend. VI

Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S.C.A. Const. Amend. XIV

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

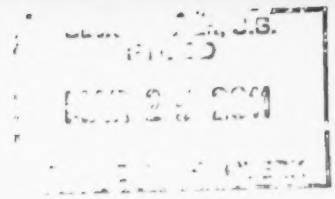
Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number

of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.



No. 10-941

IN THE
SUPREME COURT OF THE UNITED STATES

DERRICK O'NEAL MASON,
Petitioner,

v.

KIM T. THOMAS, INTERIM COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review Mason's claim that the Eleventh Circuit erred when it found the confrontation clause violation was harmless?

2. Should this Court review Mason's claim that the Eleventh Circuit erred when it determined that his arrest claim was precluded from review under *Stone v. Powell*?

3. Should this Court review Mason's claim that his custodial statements were obtained in violation of *Miranda v. Arizona* where this claim is procedurally defaulted?

4. Did the Eleventh Circuit err when it denied Mason a certificate of appealability on some of the claims in his habeas petition?

5. Did Mason allege in the Eleventh Circuit that the district court erred in its determination concerning procedurally defaulted claims, and did the district court properly determine that these claims are procedurally defaulted?

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OPINIONS BELOW

On March 27, 1994, Derrick O'Neal Mason murdered Angela Cagle during an attempted robbery of a Majik Market in Huntsville, Alabama. Mason was convicted and sentenced to death for this murder. On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Mason's conviction and death sentence. *Mason v. State*, 768 So. 2d 981 (Ala. Crim. App. 1998), *aff'd*, 768 So. 2d 1008 (Ala. 2000). This Court denied Mason's petition for writ of certiorari. *Mason v. Alabama*, 531 U.S. 994 (2000).

Mason subsequently filed a petition for post-conviction relief under Rule 32 of the Alabama Rules of Criminal Procedure. On July 7, 2005, the post-conviction court denied the Rule 32 petition.[1] That decision is not published. Mason did not timely file his notice of appeal, and on September 8, 2005, the Alabama Court of Criminal Appeals dismissed Mason's appeal, in an unpublished order, because it was untimely filed. The Alabama Supreme Court denied certiorari review in an unpublished order on August 18, 2006.

Mason then filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Alabama. On March 3, 2009, Judge Virginia Emerson Hopkins entered an unpublished memorandum opinion and final

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[1] The Rule 32 petition was originally denied on August 6, 2004, but due to a clerical error, the parties were not informed of the dismissal until April 25, 2005. The Alabama Court of Criminal Appeals granted Mason an out-of-time appeal. The facts surrounding this action are set forth in more detail in the statement of the case.

judgment denying the habeas petition. Pet. App. 119a-254a. The Eleventh Circuit affirmed on May 11, 2010. *Mason v. Allen*, 605 F.3d 1114 (11th Cir. 2010).

STATEMENT OF THE CASE

A. The Proceedings Below

In 1994, Mason was indicted by a grand jury for the capital murder of Angela Cagle during an attempted robbery in violation of Ala. Code, §13A-5-40(a)(2). The jury found Mason guilty. Following a sentencing hearing, the jury recommended that Mason be sentenced to death by a 10-to-2 vote. The trial court accepted the jury's recommendation and sentenced Mason to death.

On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Mason's conviction and death sentence. *Mason v. State*, 768 So. 2d 981 (Ala. Crim. App. 1998), *aff'd*, 768 So. 2d 1008 (Ala. 2000). This Court denied Mason's petition for writ of certiorari. *Mason v. Alabama*, 531 U.S. 994 (2000).

On October 17, 2001, Mason filed a petition for post-conviction relief under Rule 32 of the Alabama Rules of Criminal Procedure. The State filed its answer to the Rule 32 petition in January of 2002. On August 6, 2004, the trial court denied the Rule 32 petition. However, due to a clerical error, the parties were not informed of the dismissal until April 25, 2005. Mason then filed a petition for writ of mandamus in the Alabama Court of Criminal Appeals requesting permission to file an out-of-time

appeal. The State stipulated to the facts in the petition for writ of mandamus. On June 29, 2005, the Alabama Court of Criminal Appeals granted the writ, directed the trial judge to set aside its order dismissing the Rule 32 petition and to reissue its order denying the petition, and notify Mason so that a timely notice of appeal could be filed.

The trial court again denied the Rule 32 petition on July 7, 2005. Under Alabama law, Mason was required to file a notice of appeal from the denial of the Rule 32 petition on or before August 18, 2005. However, Mason did not file his notice of appeal until August 22, 2005. On September 8, 2005, the Alabama Court of Criminal Appeals dismissed Mason's appeal because it was untimely filed. Pet. App. 112a. The Alabama Supreme Court denied certiorari review on August 18, 2006. Pet. App. 113a.

Mason filed a petition for writ of habeas corpus in the Northern District of Alabama. Mason filed an amendment to the habeas petition on January 16, 2007. The State of Alabama filed its answer to the amended petition on March 27, 2007. On March 3, 2009, Judge Virginia Emerson Hopkins entered a memorandum opinion and final judgment denying the habeas petition. Pet. App. 119a-254a. Mason filed a motion to alter or amend the judgment on March 17, 2009. This motion was denied on March 25, 2009.

Mason filed a notice of appeal and a motion for a certificate of appealability on April 24, 2009. On May 14, 2009, Judge Hopkins denied Mason's certificate of appealability. Mason then filed a certificate of appealability with the Eleventh Circuit

Court of Appeals. On July 10, 2009, the Eleventh Circuit granted Mason's motion for a certificate of appealability on four issues. On May 11, 2010, the Eleventh Circuit affirmed the district court's denial of habeas relief. *Mason v. Allen*, 605 F.3d 1114 (11th Cir. 2010).

B. Statement of the Facts

During the early morning hours of March 27, 1994, 25-year-old Angela Cagle was murdered while working in a Majik Mart convenience store in Huntsville, Alabama. *Mason v. State*, 768 So. 2d 981, 983 (Ala. Crim. App. 1998). Around 3:30 a.m. on March 27, 1994, DeAnna Lechman walked into the Majik Mart to buy cigarettes for her mother. No one was visibly present in the store so Lechman began calling out to get the clerk's attention. When no one answered, she walked to the back of the store where she spotted the partially nude body of Angela Cagle. Lechman went to the counter and telephoned for help. *Id.*

The first officer to arrive at the scene found Cagle's body lying across a desk in the storeroom. She was wearing only her socks and appeared to have a gunshot wound to the right side of her face. The coroner found a second gunshot wound on the victim's left cheek when he moved her body. *Id.*, at 984.

Investigator Harry Renfroe of the Huntsville Police Department, testified that during the investigation of the death of Angela Cagle a young man approached Officer Dewey Miller and asked what type of weapon was used in the murder. Officer Miller could not answer this question and told him that he needed to talk to an investigator.

The young man gave Officer Miller a number where he could be reached. Investigator Renfroe testified that he later talked with and met this individual who gave him the following information: (1) that he had information about a .380 caliber pistol used in the murder; (2) that the murder weapon was a Davis brand gun; (3) that the murderer's name was Derrick Mason; and (4) that Mason was "out of control ... trying to make a name for himself and that he was involved in this homicide." (R. 1153-1157)

This same individual subsequently told Investigator Renfroe that Mason would most likely be at a certain apartment complex later that evening. A be-on-the-lookout was issued for Mason. That night, two officers spotted Mason's vehicle and stopped it while it was in the drive-through lane of a fast food restaurant. Mason cooperated with the officers when they told him to get out of the vehicle and placed him under arrest. During an inventory search of the vehicle, a Davis .380 pistol was found in Mason's vehicle. Later that night, this pistol was identified as the murder weapon. *Mason*, 768 So. 2d at 985.

After Mason was arrested and brought to the police station, Investigator Renfroe informed him of his *Miranda* rights by reading them from a printed card. (R. 1167) Mason acknowledged that he understood his rights. There were no promises or threats made to Mason. (R. 1168) When Mason was asked about the weapon that was found in his vehicle, he stated that he had a Davis .380 in his truck that he had borrowed from an acquaintance. (R. 1190) Mason told Investigator Renfroe that the gun had been in his possession since he had borrowed it and that he had fired it twice. (R. 1171-

1172) Mason initially denied any involvement in the victim's murder. (R. 1174-1175) Later during the interview, Investigator Renfroe learned that the gun found in Mason's truck was the murder weapon. When confronted with this fact, Mason continued to deny any involvement in the murder. (R. 1176)

Mason subsequently asked everyone in the room but Investigator Bud Parker of the Huntsville Police Department to leave. The other investigators complied and Investigator Parker read Mason his *Miranda* rights a third time. Mason then gave a detailed statement to Investigator Parker, admitting that he murdered Angela Cagle.[2]

REASONS FOR DENYING THE PETITION

The claims in Mason's petition for writ of certiorari are subject to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. §2241, *et. seq.* Mason has failed to show that the state court's opinion on these claims is "contrary to or an unreasonable application of" this Court's "clearly established" precedent. 28 U.S.C. §2254 (d)(1). This Court should deny the certiorari petition for this reason alone.

Mason has not raised any certworthy issue. The split he asserts are illusory, and he is seeking no more than factbound error correction of the sound decision of an intermediate state appellate court. Such review is not the proper domain of this Court.

[2] Mason's confession is set out in its entirety in the opinion of the Alabama Court of Criminal Appeals. *Mason v. State*, 768 So. 2d 981, 985-987.

SUP. CT. R. 10. There is no split here, and no other reason why this Court should grant certiorari.

I. This Court Should Decline To Review Mason's Claim That The Eleventh Circuit Erred When It Found The Confrontation Clause Violation In His Case Was Harmless.

Mason contends that the Eleventh Circuit erred when it found that the confrontation clause violation in his case was harmless error. Mason asserts that this holding is contrary to holdings of the Fifth and Second Circuits. Certiorari should be denied on this claim for at least five reasons.

A. This Claim Is Procedurally Defaulted Because It Was Not Fairly Raised In The State Courts.

First, this claim is procedurally defaulted because it was not fairly presented to the Alabama courts. Before trial, Mason filed numerous motions for the State to reveal the identity of any confidential informants. The trial court denied these motions. At trial, Investigator Harry Renfroe of the Huntsville Police Department testified that during the investigation of the victim's death a young man approached Officer Dewey Miller and began asking him questions about the murder. Officer Miller told the young man that he could not give him any information. Investigator Renfroe later talked with and met this individual who gave him the following information: (1) that he had information about a .380 caliber pistol used in the murder; (2) that the murder weapon was a Davis brand gun; (3) that the murderer's name was Derrick Mason; and (4) that Mason was "out of control ... trying to make a name for himself and that he was involved in this

homicide." (R. 1153-1157) There was no objection to this testimony at trial from Mason's attorneys. After this testimony, the trial court charged the jury that it could not consider these statements for the truth of the matter asserted but only to show the sequence of events. (R. 1183-1184)

Issue V of Mason's brief to the Alabama Court of Criminal Appeals was captioned: "Did The Trial Court Err In Denying The Appellant's Request To Reveal The Identity Of An Alleged Confidential Informant?" Mason then argued in Issue V of this brief that the trial court erred when it denied his attempts to discover the identity of the confidential informant even though he filed a motion for expanded discovery under *Ex parte Monk*, 557 So. 2d 832 (Ala. 1989). Mason also argued that this individual was not a confidential informant in the legal sense because Detective Renfroe "had no previous dealings with [him], and no track record of reliability." Mason stated the following in the last sentence of this argument: "The informant's testimony was clearly hearsay and Mason was deprived of his Sixth Amendment right to confront the witness who accused him of this crime."[3] The Alabama appellate courts did not address nor mention Mason's one-sentence claim that he was deprived of his Sixth Amendment right to confront the witness who accused him of this crime in their direct appeal opinions. *Mason v. State*, 768 So. 2d 981, 1001-1002 (Ala. Crim. App. 1998), *aff'd*, *Ex parte Mason*, 768 So. 2d 1008, 1010-1012 (Ala. 2000).

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[3] Mason made the exact same argument in the Alabama Supreme Court.

Mason did not present this claim face-up and squarely to the state courts. *Picard v. Connor*, 404 U.S. 270, 275 (1971)(federal claim must be fairly presented to the state courts). Because this claim is defaulted, this Court should decline to grant Mason's certiorari petition.

B. Mason's Argument That The Eleventh Circuit's Holding Is Contrary To Holdings Of Other Circuits Was Not Raised In The Lower Court.

Second, Mason did not argue in his rehearing brief to the Eleventh Circuit that its holding that the confrontation clause violation was harmless is contrary to the holdings of the Fifth and Second Circuits. This Court will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). This case presents no reason to deviate from that rule. For that reason alone, the writ should be denied as to this argument.

C. The Underlying Issue Is Not Worthy Of This Court's Review.

Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons. *See Faye v. Noia*, 372 U.S. 391, 436 (1963); Rule 10, Rules of the Supreme Court of the United States. In addition, the demands on this Court's time mandate that it select for review only those truly important cases that will have a wide ranging impact. Mason has not alleged compelling grounds for this Court to grant certiorari review of this claim. Moreover, the instant claim involves a simple application of established

precedent to the facts of this case. For that reason, a decision in this case would be of such narrow scope and limited precedential value that it is not worthy of certiorari consideration.

D. There Is No Split.

Fourth, there is no real split on this issue. Mason asserts that the Eleventh Circuit's holding that the confrontation clause violation in this case is harmless is contrary to holdings of the Fifth and Second Circuits. This Court should not grant certiorari on this claim because the holding of the Eleventh Circuit is not contrary to the holdings of the Fifth and Second Circuits. All of these circuits applied the harmless error analysis set forth by this Court in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). While the Eleventh Circuit found that the confrontation clause error in Mason's case was harmless, the Fifth and Second Circuits found that the confrontation clause errors in those cases was not harmless. *See Fratta v. Quarterman*, 536 F.3d 485 (5th Cir. 2008); *United States v. Gomez*, 617 F.3d 88 (2nd Cir. 2010).

The differences between those results are not due to any split on the proper legal rule here, but rather due to differences in the facts to which those rules were applied in those cases. The facts in *Fratta* and *Gomez* are distinguishable from the facts in the instant case. In *Fratta*, a sheriff's deputy testified to the substance of custodial confessions given to law enforcement officials by the two men who murdered the victim. In addition, a girlfriend of one of the men testified concerning statements he made to her about the murder. *Fratta*, 536 F.3d at 488-490. In *Gomez*, a detective testified about recorded

conversations between Gomez and his co-conspirator. *Gomez*, 617 F.3d at 89-90. In addition, in *Fratta* and *Gomez*, the evidence against the defendants was not overwhelming. In the instant case, as set forth below, the evidence of Mason's guilt was overwhelming.

The holding of the Eleventh Circuit in this case is not contrary to the holdings of the Fifth and Second Circuits. This case does not present, at this time, sufficient and special important reasons to grant certiorari review. *Faye v. Noia*, 372 U.S. 391, 436 (1963); SUP. CT. RULE 10.

E. Mason's Claim Has No Merit.

Fifth, there is no compelling reason to grant cert here because Mason's claim fails on the merits. The Eleventh Circuit properly determined that the admission of the evidence in this case was harmless. The evidence against Mason was overwhelming – including the fact that the murder weapon was found in his possession when he was arrested and that Mason gave a detailed confession to this crime. As the Eleventh Circuit found: "When viewed in light of the overall strength of the prosecution's case and the presence of corroborating evidence, we cannot say that there was 'more than a reasonable probability that the [Confrontation Clause] error contributed to the [conviction]' *Horsley*, 45 F.3d at 1493." *Mason*, 605 F.3d at 1124. The Eleventh Circuit also correctly concluded that the error was also harmless during the penalty phase. The Eleventh Circuit stated the following concerning the penalty phase claim:

> Even without the improper testimony and argument, there was sufficient evidence to

> support the heinous, atrocious, and cruel aggravating factor. Mason himself presented testimony that he lacked the ability to control his behavior. Mason's family also testified that at times they could not control Mason, and that they put him on various medications to help him control himself and, even then, he would still have problems. Based on this testimony, his counsel was able to argue to the jury that three statutory mitigating circumstances were present, including that Mason had substantially-impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the law. The informant's statement that Mason was "out of control" is hardly prejudicial if the defense also argued that Mason could not control his behavior as a mitigating circumstance. Under all of the circumstances presented in this record, we conclude that Mason has failed to show "more than a reasonable possibility that the error contributed to the sentence." *Horsley,* 45 F.3d.

Mason, 605 F.3d at 1124.

Mason argues that the Eleventh Circuit erred when it gave significant weight to his confession because the confession's reliability has also been called into question. However, as set forth below, most of Mason's claim concerning the voluntariness of his statement is procedurally defaulted. The remainder of the claim – the portion presented to the Alabama courts – is without merit. Mason, therefore, is not entitled to relief on this argument.

II. This Court Should Decline To Review Mason's Claim That The Eleventh Circuit Erred When It Determined That His Arrest Claim Was Precluded From Review Under *Stone v. Powell*.

Nor should this Court grant review on Mason's claim that the Eleventh Circuit erred when it held that his pretextual arrest claim was precluded from review under *Stone v. Powell*, 428 U.S. 465 (1976). Mason asserts that this claim is not barred by *Stone* because the state courts did not analyze or consider the evidence of pretext that he introduced at his suppression hearing. For the reasons set forth below, certiorari should be denied on this claim.

A. Certiorari Should Be Denied Because The Underlying Issue Is Not Worthy Of This Court's Review.

First, Mason raises no question of wide-ranging significance. Mason has not alleged compelling grounds for this Court to grant certiorari review of this claim. Moreover, the instant claim involves a simple application of established precedent to the facts of this case. In addition, Mason does not allege that there is a split in the circuits concerning the Eleventh Circuit's treatment of this claim. For that reason, a decision in this case would be of such narrow scope and limited precedential value that it is not worthy of certiorari consideration.

B. Mason Is Not Entitled To Relief On This Claim.

Mason's argument that his Fourth Amendment claim is not barred by *Stone v. Powell* because the trial court made no factual findings concerning this

claim and because the appellate court's review was cursory is without merit. In *Stone*, this Court held that

> where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

428 U.S. at 494; *see also Cardwell v. Taylor,* 461 U.S. 571(1983) (summarily reversing, on the basis of *Stone*, a lower court's consideration of a Fourth Amendment claim on habeas). The Eleventh Circuit has clarified *Stone's* "full and fair consideration" requirement in two important respects, both of which bear directly on this case. First, the Eleventh Circuit (or, more accurately, its predecessor) has emphasized that "an 'opportunity for full and fair litigation' [under *Stone*] means just that: an opportunity." *Caver v. Alabama*, 577 F.2d 1188, 1192 (5th Cir. 1978). Accordingly, "[i]f a state provides the processes whereby a defendant can obtain full and fair litigation of a fourth amendment claim, *Stone v. Powell* bars federal habeas corpus consideration of that claim whether or not the defendant employs those processes." *Id.*; *accord Huynh v. King*, 95 F.3d 1052, 1058 (same). Second, the Eleventh Circuit has held that full and fair consideration "includes at least one evidentiary hearing in a trial court and the availability of meaningful appellate review when there are facts in dispute, and full consideration by an appellate court when the facts are not in dispute." *Bradley v. Nagle*, 212 F.3d 559, 565 (11th Cir. 2000). Contrary to Mason's argument, this case law of the Eleventh Circuit is not contrary to the case law of

the Fifth and Tenth Circuits and, in fact, is entirely consistent with the holdings of those circuits. *See Matthews. Workman*, 577 F.3d 1175, 1194 (10th Cir. 2009); *Hughes v. Dretke*, 412 F.3d 582, 596 (5th Cir. 2005).

In this case, Mason was given a full and fair opportunity to litigate his Fourth Amendment claim in the state courts. A hearing was held on Mason's motions to suppress and he was allowed to present evidence in support of these motions. After hearing the testimony presented in the suppression hearing, the trial court denied Mason's motions to suppress. The Alabama Court of Criminal Appeals then gave full consideration to Mason's Fourth Amendment claim, holding as follows:

> In this case, the police arrested the appellant pursuant to an outstanding warrant for third-degree assault. The appellant does not challenge the validity of the arrest warrant. The evidence established that the appellant was advised of his rights three separate times, and that each time he knowingly and voluntarily waived his rights and spoke with the police. There was no evidence that the appellant was under the influence of drugs, or that his confession was coerced by inducements or threats. "As long as the police officer is doing only what is objectively authorized and legally permitted, the officer's subjective intent in doing it is irrelevant." *Ex parte Scarbrough,* 621 So.2d 1006, 1010 (Ala.1993). In this case, the officers' arrest and questioning of the appellant were objectively reasonable; accordingly, we find no plain error

> in the trial court's denial of the motion to suppress the appellant's custodial statement.

Mason v. State, 768 So. 2d 981, 997-1000, 1001 (Ala. Crim. App. 1998).

Mason was given a full and fair opportunity to litigate his Fourth Amendment claim in the state courts. The Eleventh Circuit correctly found that *Stone* prohibits federal review of this claim. *Mason v. Allen*, 605 F.3d at 1120-1121. This Court should, therefore, deny certiorari review of this claim.

III. Certiorari Should Be Denied On Mason's Claim That His Custodial Statements Were Obtained In Violation Of *Miranda v. Arizona*, 384 U.S. 436 (1966), Because The Claim Is Procedurally Defaulted.

The Eleventh Circuit and the district court properly refused to consider Mason's claim that his statements were involuntary because this claim is procedurally defaulted. Mason did not allege on direct appeal that he was subjected to improper questioning by law enforcement, that he was intoxicated or hungry, that he was psychologically coerced, or that he was misled by law enforcement. Mason's entire argument to the Alabama Court of Criminal Appeals and the Alabama Supreme Court read:

> As mentioned in the preceding argument, Mason was placed under arrest for assault in the third degree. He was placed under arrest during the evening of March 29, 1994. Mason was transported to the Huntsville Police Department, and there he was interrogated for several hours by detectives. Mason's

> contention is that his arrest on the third-degree assault was merely a pretext for the police to interview him about the homicide of Ms. Cagle. Mason confessed to the third-degree assault, and as such any further questioning of Mason regarding other alleged incidents was in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The continued questioning of Mason after his alleged statement regarding the misdemeanor assault was in violation of his rights under *Miranda*, and as such, the alleged custodial statement should have been suppressed by the trial court.

The allegations Mason attempted to raise in federal court were presented for the first time in his post-conviction petition. The post-conviction court found in its order denying relief that those allegations were procedurally barred because they could have been but were not raised on direct appeal. Mason's failure to make these allegations on direct appeal was a procedural default under state law, which bars federal habeas corpus review of this claim. *See e.g., Caniff v. Moore*, 269 F.3d 1245, 1246-1247 (11th Cir. 2001); *Baldwin v. Johnson*, 152 F.3d 1304, 1310, 1318-1320 (11th Cir. 1998); *King v. Strickland*, 714 F.2d 1481, 1491-1492 (11th Cir. 1983) ("The failure to bring up an issue on appeal, no less than at trial, may preclude federal habeas corpus review.").

There are only two exceptions to the procedural default rule. First, a petitioner may obtain federal review of a procedurally defaulted claim if he can show both cause for the default and actual prejudice resulting from the default. *Wainwright v. Sykes*, 433

U.S. 72 (1977); *Smith v. Newsome*, 876 F.2d 1461, 1465 (11th Cir. 1989). The second exception is that, in extraordinary cases, a federal court may grant a habeas petition without a showing of cause or prejudice to correct a fundamental miscarriage of justice. *Engle v. Issac*, 456 U.S. 107 (1982); *Murray v. Carrier,* 477 U.S. 478 (1986). Mason has not attempted to prove that he meets either of these exceptions.

Mason does argue that his claim is not procedurally defaulted because this Court's precedent requires only that he fairly present his claim in one full round of the state's established appellate review process. This argument fails, however, because Mason did not fairly present his claim in that matter. Mason never argued on direct appeal that he was subjected to improper questioning by law enforcement, that he was intoxicated or hungry, that he was psychologically coerced, or that he was misled by law enforcement.

Mason also argues that this claim is not procedurally defaulted because the Alabama courts conducted plain error review of the record in his case. While Alabama has a plain error rule in death penalty cases that permits review of some matters even absent an objection at trial, Rule 39(k) and Rule 45A, Ala.R.App.P., this claim was not reviewed pursuant to either of those rules on direct appeal and is not within the scope of those rules. *Mason v. State*, 768 So. 2d 981, 1001 (Ala. Crim. App. 1998), *aff'd,* 768 So. 2d 1008 (Ala. 2000). A plain error rule which is applicable on direct appeal does not permit collateral review of a claim not addressed on direct appeal. *See United States v. Frady*, 456 U.S. 152, 163-165 (1982). The Eleventh Circuit examined

whether Alabama's plain error rule excuses procedural defaults in state court or removes the bar to federal court review of defaulted claims and stated the following:

> Since *Magwood* was silent about the non-effect of Alabama's plain error rule on procedural default issues, we will be explicit: the mere existence of a "plain error" rule does not preclude a finding of procedural default; moreover, the assertion by an Alabama court that it did not find any errors upon its independent review of the record does not constitute a ruling on the merits of claims not raised in that court or in any court below. Unless there is some indication that the state court was aware of this issue, we cannot say that the court rejected the merits of petitioner's constitutional claim. A contrary rule would encourage the "sandbagging" of state courts criticized in *Wainwright v. Sykes,* 433 U.S.. *See Murray v. Carrier,* 477 U.S. (possibility of "sandbagging" exists on appeal "since appellate counsel might well conclude that the best strategy is to select a few promising claims for airing on appeal, while reserving others for federal habeas review should the appeal be unsuccessful."). Accordingly, we reject Julius' argument. (footnote omitted)

Julius v. Johnson, 840 F.2d 1533, 1546 (11th Cir.), *modified on unrelated grounds*, 854 F.2d 400 (11th Cir.), *cert. denied*, 488 U.S. 960 (1988). There is nothing in the opinion of the Alabama courts which

indicates that those courts reviewed Mason's claim. This Court should therefore reject Mason's argument that the claim is not procedurally defaulted because there was a plain error review conducted in this case.

This Court should not grant certiorari review of Mason's claim that his statements were involuntary because the claim is procedurally defaulted. Mason has done nothing to show that his claims are not procedurally defaulted. In addition, Mason has not shown that there is a split in the circuits concerning whether the claim is procedurally defaulted.

IV. Certiorari Should Be Denied On Mason's Claim That The Eleventh Circuit Erred When It Denied A Certificate Of Appealability On Several Of The Claims In His Habeas Petition.

Mason contends that the Eleventh Circuit erred when it denied his request for a certificate of appealability on the following: his claim that the State used its peremptory challenges to eliminate potential jurors on the basis of their race and gender; his claim that he was entitled to relief on his prosecutorial misconduct claim; his claim that he was entitled to relief on claims concerning the heinous, atrocious, and cruel aggravating circumstance; his claim that he was denied the effective assistance of counsel at his trial and sentencing; and, his claim that the district court erred when it denied him an evidentiary hearing. Mason asserts that reasonable jurists would find the district court's assessment of his claims debatable or wrong or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. As explained below, certiorari

should not be granted on this claim because there is no split on these issues, and the claims Mason contends should be reviewed are either procedurally defaulted or without merit.

A. Mason's Claim That The State Exercised Its Peremptory Challenges To Eliminate Potential Jurors On The Basis Of Their Race Or Gender Is Procedurally Defaulted.

Mason's claim that the State used its peremptory challenges to eliminate potential jurors on the basis of their race and gender is procedurally defaulted because it was not raised at trial or on direct appeal. Mason attempted to raise this claim in his state post-conviction petition, and that court found the claim to be procedurally defaulted for the reasons set forth above. Mason then failed to timely appeal the denial of his state post-conviction petition to the Alabama Court of Criminal Appeals – another reason this claim is defaulted.

When the district court refused to consider this claim it properly found that Mason does not dispute that he failed to timely appeal the denial of his state post-conviction petition and does not deny that he never presented his claim that the State exercised its peremptory challenges in a discriminatory manner against women. Pet. App. 233a. The district court also properly rejected Mason's claim that he presented his *Batson* claim on direct appeal because he presented the overruled *Batson* objections to the Alabama Court of Criminal Appeals and the Alabama Supreme Court. The district court stated the following concerning this argument:

> Nowhere in any brief or materials presented on direct appeal did Mason raise a *Batson* claim. He simply attached a document entitled "List of Adverse Trial Court Rulings to the Briefs", seven of which read: "Overruled *Batson* challenge" and a page citation to the trial record. Additionally, Mason at no point complained that he was raising such a claim and the state court had overlooked the effort. Contrary to the misleading assertion made here, Mason did not present a *Batson* claim to the state court during the direct appeal process. (footnote omitted)

Pet. App. 233a-234a.

Mason's claim that the Eleventh Circuit erred when it denied a certificate of appealability on this claim is without merit because the claim is procedurally defaulted.

B. Mason's Argument That He Is Entitled To Relief On His Prosecutorial Misconduct Claim Is Without Merit.

Mason asserts that reasonable jurists could find the district court's assessment of his prosecutorial misconduct claim debatable or wrong. Mason argues that the prosecutor improperly vouched for the credibility of the State's witnesses, made improper and incorrect statements of law and fact, mischaracterized testimony to the jury, and introduced racial bias and sexual assault to inflame the jury to vote for the death penalty.

Most[4] of the prosecutorial misconduct claims Mason is raising were addressed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. When a habeas petitioner's claim has been adjudicated on the merits in state court proceedings, 28 U.S.C. §2254 (d) forecloses relief unless either subsections 2254(d)(1) or (d)(2) are applicable. *Early v. Packer*, 537 U.S. 3, 7 (2002). The burden of showing that an issue falls within subsections 2254(d)(1) or (d)(2) is on the petitioner. *See Woodford v. Visciotti*, 537 U.S. 19, 25 (2002). Mason did not allege in the district court, in his certificate of appealability to the Eleventh Circuit, and, has not alleged in his certiorari petition that the State court's determination of this issue "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(1)-(2). Certiorari should be denied for this reason alone.

In addition, the district court examined Mason's prosecutorial misconduct claims that were raised in the Alabama Court of Criminal Appeals and the Alabama Supreme Court and found that the state appellate courts properly denied relief on the claims.

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[4] Most of Mason's prosecutorial misconduct claim was raised in the state courts. However, some of the claims were not raised in state court and are procedurally defaulted. (State's Answer, pp. 30-47) Mason has not really delineated the claims he is raising in his certiorari petition. To the extent that Mason is attempting to allege any prosecutorial misconduct claims that are defaulted, the State does not waive its default arguments.

Pet. App. 197a-232a. While Mason disagrees with this finding, he has not attempted to prove that the district court was wrong when it found that the state court's treatment of his claims is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(1)-(2). Certiorari should, therefore, be denied on this claim.

C. Mason Is Not Entitled To Relief On His Claim That The Trial Court's Findings And Jury Instructions Concerning Aggravators And Mitigators At Sentencing Were Erroneous.

Mason argues that the trial court's findings and instructions concerning aggravating and mitigating circumstances at sentencing were erroneous. Specifically, Mason argues that the trial court erred when it found that the heinous, atrocious, and cruel aggravating circumstance existed in his case, when it incorrectly required the jury to find mitigating circumstances unanimously while permitting aggravating circumstances to be found by a less than unanimous vote, and when it instructed the jury that it had to find aggravating circumstances beyond a reasonable doubt. Certiorari should not be granted on any of these arguments.

First, Mason has not alleged in his certiorari petition that the Alabama Court of Criminal Appeals treatment of the claim concerning whether the heinous, atrocious, or cruel aggravating

circumstance existed is contrary to, or involved an unreasonable application of, this Court's precedent. 28 U.S.C. §2254(d)(1)-(2). In addition, the district court properly found that Alabama courts have consistently interpreted Alabama's heinous, atrocious, or cruel aggravating circumstance to include psychological torture as well as physical suffering and that the victim in this case was "clearly subjected to psychological torture and there was more than enough evidence for the jury to infer that she physically suffered after Mason shot her the first time." Pet. App. 196a-197a. Mason's argument to the contrary is without merit.

Second, Mason's claim that the trial court's jury instructions concerning the aggravating and mitigating circumstances were incorrect is procedurally defaulted from review because he did not not raise it on direct appeal. The district court found that this claim was precluded from review for this reason. Pet. App. 169a. Mason argues that this determination was incorrect because he raised it in the context of his ineffective assistance of counsel claim. This argument was never presented to the Eleventh Circuit and should, therefore, not be considered by this Court. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992)(holding that this Court will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances). Moreover, the fact that Mason argued that trial counsel was ineffective for not challenging the trial court's jury instructions did not present the substantive claim to the Alabama Court of Criminal Appeals.

Third, Mason's next argument – that the trial court's jury instruction was incorrect because it did

not instruct the jury that it had to find aggravators beyond a reasonable doubt – is raised for the first time in Mason's certiorari petition. This Court will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). This case presents no reason to deviate from that rule. For that reason alone, the writ should be denied as to this argument. Another reason for denying certiorari on this argument is that Mason has not alleged a split in the circuits concerning this claim.

D. Mason's Claim That Reasonable Jurists Could Debate Whether The District Court Erred In Denying Him Relief On His Ineffective Assistance Of Counsel Claims Is Without Merit.

Mason contends that he proved in the district court that his attorneys were ineffective. Mason asserts that reasonable jurists, therefore, could debate whether the district court erred in denying him relief on this claim. This Court should deny certiorari review of this claim because Mason has yet to show that the holding of the Alabama Court of Criminal Appeals is contrary to, or an unreasonable application of, this Court's holding in *Strickland v. Washington*, 466 U.S. 668 (1984). 28 U.S.C. §2254(d)(1)-(2). After considering Mason's claim, the district court agreed with this argument by the State and held that "Mason has not shown that the state court's review of these claims is an unreasonable application of either prong of the *Strickland* standard or an unreasonable determination of the facts in light of the evidence before it." Pet. App. 248a-250a.

E. The District Court Properly Denied Mason's Request For An Evidentiary Hearing.

Mason contends that he was entitled to an evidentiary hearing in district court on several of his ineffective assistance of counsel claims. Mason asserts that he made a reasonable attempt to develop the factual record in state court.

The ineffective assistance of counsel claims Mason requests an evidentiary hearing on are procedurally defaulted because Mason did not timely appeal the denial of his state post-conviction petition to the Alabama Court of Criminal Appeals. Pet. App. 236a-238a. It is well established that an evidentiary hearing should not be held on the merits of a procedurally defaulted claim. The Eleventh Circuit stated the following concerning an evidentiary hearing on procedurally defaulted claims:

> A state habeas petitioner is not entitled to an evidentiary hearing in federal court on the merits of a procedurally defaulted claim unless he can first overcome the procedural bar. This requires showing either cause for failing to develop in state court proceedings the facts supporting his claim, and prejudice resulting from that failure, *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 11-12, 112 S.Ct. 1715, 1721, 118 L.Ed.2d 318 (1992); *Weeks v. Jones,* 26 F.3d 1030, 1043 (11th Cir.1994), *cert. denied,* 513 U.S. 1193, 115 S.Ct. 1258, 131 L.Ed.2d 137 (1995), or a "fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." *Tamayo-Reyes,* 504 U.S. at 11-12, 112 S.Ct. at 1721. A

> petitioner is not entitled to a hearing on the threshold issues of cause and prejudice or manifest injustice without first proffering specific facts which support a finding that one of these exceptions to the procedural default rule exists. *See Smith v. Wainwright,* 741 F.2d 1248, 1261 (11th Cir.1984), *cert. denied,* 470 U.S. 1087, 105 S.Ct. 1853, 85 L.Ed.2d 150 (1985).

Hill v. Jones, 81 F.3d 1015, at 1023 (11th Cir. 1996). Mason has not attempted to prove cause and prejudice or a fundamental miscarriage of justice to overcome the procedural default of his ineffective assistance of counsel allegations. Certiorari should therefore be denied on this claim.

V. This Court Should Decline To Review Mason's Claim That Several Of His Claims Are Not Procedurally Defaulted.

Mason asserts that the district court's determination that several of his claims were procedurally defaulted merits this Court's review. Mason argues that reasonable jurists could debate whether his defaulted claims were effectively presented to the Alabama courts. He also argues that Rule 32.1(f), Ala.R.Crim.P., - providing for out-of-time appeals – has been inconsistently applied. Neither of those claims warrants review by this Court, for a number of reasons.

A. Certiorari Should Be Denied Because This Claim Was Not Raised In The Lower Courts.

Mason did not argue in the Eleventh Circuit that his defaulted claims were effectively presented to the

Alabama courts or that Rule 32.1(f), Ala.R.Crim.P., has been inconsistently applied. This Court will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). This case presents no reason to deviate from that rule. For that reason alone, the writ should be denied as to this argument.

B. Mason's Claim Is Without Merit.

Mason's first argument that his *Batson* claim, his jury selection claims, his improper jury instructions claims, and his *Brady* claim were effectively presented on direct appeal is without merit. Mason did not raise these claims in the Alabama Court of Criminal Appeals or in the Alabama Supreme Court. It appears – although it is not clear from the certiorari petition – that Mason is arguing that these claims were presented because the record was searched for plain error or because the claims were referenced in his list of adverse rulings part of his brief. As set forth above, neither of these arguments is sufficient to prove that these claims are not procedurally defaulted. (See Arguments III and IV-A, above)

Mason next argues for the first time in his certiorari petition that his ineffective assistance of counsel claims are not procedurally defaulted because Rule 32.1(f), Ala.R.Crim.P., is not firmly established and regularly followed. Mason relies on the dissent in the Eleventh Circuit's opinion in *Maples v. Allen*, 586 F.3d 879 (11th Cir. 2009), to support his argument. However, Mason completely ignores the holding of the majority of the panel

which found that "Alabama's 42-day and out-of-time appeal rules were firmly established and regularly followed by the Alabama courts." *Maples*, 586 F.3d at 888. Mason's State-specific, fact-intensive argument is not worthy of this Court's review for two primary reasons: (1) an opinion regarding the adequacy of Alabama's 42-day deadline is not nationally important and (2) Mason's firmly established and regularly followed argument is incorrect. A combination of two rules prevented Mason from appealing the dismissal of his state post-conviction petition after August 18, 2005, and would prevent him from doing so today: Alabama Rules of Appellate Procedure 4(a)(1), which sets the 42-day deadline for filing a notice of appeal, and 2(a), which mandates dismissal for filing outside the 42-day window.[5] Both rules were "firmly established" in 2005 because each took effect on December 1, 1975, and have been published in the Alabama Code ever since. *See* Ala. Code, Vol. 23, Rules of Appellate Procedure 2(a), 4(a) (1975).

The rules were also "regularly followed" in 2005, as shown by numerous published decisions recognizing the dismissal of untimely appeals before 2005. *See, e.g.*, *Hayden v. Harris*, 437 So. 2d 1283 (Ala. 1983) (citing five cases for the proposition that "[w]e have consistently held that the failure of an appellant to comply with the rules that requiring [sic] notice of appeal be filed within 42 days from the date of entry of final judgment deprives the Court of

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[5] Mason cabins his firmly established and regularly followed analysis to Alabama Rule of Criminal Procedure 32.1(f). This rule, however, merely provides the *vehicle* for criminal defendants/petitioners to request an out-of-time appeal; that is, a second post-conviction petition filed in the circuit court.

appellate jurisdiction"); *Woods v. State*, 371 So. 2d 944 (Ala. 1979) (dismissing an untimely criminal appeal); *Davis v. State*, 644 So. 2d 44 (Ala. Crim. App. 1994) (same); *Martinez v. State,* 602 So. 2d 504 (Ala. Crim. App. 1992) (same); *Shephard v. State,* 598 So. 2d 39 (Ala. Crim. App. 1992) (same); *Turner v. State*, 365 So. 2d 335 (Ala. Crim. App. 1978) (same).

The purpose of the firmly established and regularly followed requirement is to prevent States from "invoking new procedural rules without adequate notice to litigants who, in asserting their federal rights, have in good faith complied with existing state procedural law." *Beard v. Kindler*, 130 S.Ct. 612, at 619 (Kennedy J., concurring). That purpose was met here. Mason's attorneys had notice of the 42-day deadline and the consequence for failing to meet it because, as previously stated, Appellate Rules 2(a) and 4(a) had been published in the Alabama Code since 1975.

That Alabama courts have discretion to grant an out-of-time appeal does not strip Alabama's 42-day filing deadline of its firmly established and regularly followed status. *Beard v. Kindler*, *supra*, at 618 ("We hold that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review. . . . [A] discretionary rule can be 'firmly established' and 'regularly followed'—even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others"). Nor does the fact that the state courts have exercised that discretion render the rule inadequate. *See id.*; *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) (concluding that Florida's procedural rule barring post-conviction claims that were not raised

on direct appeal was "consistently and regularly" applied because "in the vast majority of cases ... the Florida supreme court has faithfully applied its rule" and the exceptions cited by the petitioner were not "sufficient to undercut the adequacy of the Florida procedural rule").

Mason relies on this Court's grant of certiorari in *Walker v. Martin*, to argue that this Court should also grant his certiorari petition. On February 23, 2011, this Court found that California's timeliness requirement qualifies as an independent state ground adequate to bar habeas corpus relief in federal court. *Walker v. Martin*, 562 U.S. ___, 131 S.Ct. 1120 (2011). Mason's argument that this Court should grant his cert petition based on *Walker* is without merit. As set forth above, Alabama's rules concerning filing a notice of appeal are firmly established and regularly followed and Mason had notice of these rules.

Mason also argues that he cannot be held accountable because his attorneys failed to timely file his notice of appeal and relies on this Court's opinion in *Holland v. Florida*, 130 S.Ct. 2549 (2010), to support this argument. This Court should not grant certiorari on this argument because it is raised for the first time in Mason's certiorari petition. This Court will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). This case presents no reason to deviate from that rule.

CONCLUSION

For the reasons set forth above, this Court should deny Mason's petition for writ of certiorari.

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No. 10-941

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DERRICK O'NEAL MASON,

Petitioner,

—v.—

KIM T. THOMAS, Interim Commissioner,
Alabama Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THIS COURT SHOULD REVIEW THE ELEVENTH CIRCUIT'S HARMLESS ERROR ANALYSIS OF MR. MASON'S CONFRONTATION CLAUSE VIOLATION

A. The Confrontation Clause Claim Was Fairly Raised in the State Courts

The Eleventh Circuit flatly rejected the State's argument that Mr. Mason's Confrontation Clause claim was procedurally defaulted. The State's attempt to revive its meritless argument before this Court is indicative of the overall weakness of its position with respect to this claim. The Eleventh Circuit held that Mr. Mason's Confrontation Clause claim was fairly raised not only because he stated the basis for his claim in his brief to the Alabama Court of Criminal Appeals, identifying the out-of-court statements that Mr. Mason was "out of control and out to make a name for himself," but also because Mr. Mason specifically cited the Sixth Amendment as the grounds for his Constitutional challenge. R.E. 1086 – 1118.

The Eleventh Circuit further cited controlling precedent, which only requires a petitioner to "make the state court aware that the claims asserted present federal constitutional issues," in order to satisfy the exhaustion requirement. *Snowden v. Singletary*, 135 F.3d 732, 735-36 (11th Cir. 1998). Without a doubt, Mr. Mason satisfied that standard. The State, however, seeks to deflect this Court's attention from the real issue of whether the violation of Mr. Mason's Confrontation Clause claim is harmless by, again, raising procedural default.

B. The Circuit Court Split on the Harmless Error Analysis Merits This Court's Review

A principal basis on which this Court grants a petition for certiorari is to resolve conflicts among Courts of Appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. 344, 347 (1991); Sup. Ct. R. 10. The State should not suggest that the Court shirk that responsibility on the basis that the Fifth and Second Circuit cases cited by Mr. Mason contain different facts, when the Fifth and Second Circuits have applied a different standard in analyzing harmless error.

The State incorrectly asserts that the only differences between the decision below and the Fifth Circuit's opinion in *Fratta v. Quatterman*, 536 F.3d 485 (5th Cir. 2008), are factual. In *Fratta*, there was significant evidence against the defendant other than the hearsay statements, admitted in violation of the defendant's Confrontation Clause rights, including testimony from several witnesses that the defendant made statements about killing or having someone kill his wife. The Fifth Circuit cautioned that in making a harmless error determination, "the inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence." *Fratta*, 536 F.3d at 508 (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). The Eleventh Circuit here, however, did just what the Fifth Circuit cautioned against when it looked solely to the "overall strength of the prosecution's case and the presence of cor-

roborating evidence" to make its determination. App.16a. The Eleventh Circuit, in Mr. Mason's case, articulated a standard of review more deferential to the prosecution and the state court's determination of a petitioner's constitutional rights than the standard articulated by the Fifth Circuit. This represents a fundamental difference in the substantive rights of criminal defendants and merits this Court's review.

Mr. Mason's case exemplifies the impact of this lower standard. Had the Eleventh Circuit not ended its analysis at the strength of the prosecution's case and looked to the substantial influence of the hearsay statements, its result would have been different. The informant's out-of-court statements admitted in Mr. Mason's trial were damning and indisputably had a substantial influence on the jury. Based on the *Fratta* court's analysis, the Eleventh Circuit's rationale that Mr. Mason *could* have been convicted and sentenced to death anyway, based on the other evidence, is insufficient. Under the *Fratta* decision, the Eleventh Circuit would be required to analyze whether the statements that violated Mr. Mason's Constitutional rights had a substantial impact. And, like the *Fratta* case, the statements here "cannot be described as anything less than substantial." *Fratta*, 536 F.3d at 510.

Furthermore, the facts of the *Fratta* case could not be more similar, because not only were the improper statements admitted at trial, but the State magnified the effect of those statements by highlighting and repeating them during closing argument. In addition, the *Fratta* court noted that the effect of the custodial statements was

undoubtedly enhanced by the fact they were related through the testimony of a police officer "who could command the jury's respect," *id.* at 511, which is exactly the situation in Mr. Mason's case.

The Second Circuit case, *United States v. Gomez*, 617 F.3d 88 (2d Cir. 2010), contains similar facts, because there too the court held that testimony by a detective that a co-conspirator's identification of the defendant as his supplier was inadmissible hearsay. The *Gomez* court further held that even a limiting instruction by the judge did not correct the harm caused by the admission of such hearsay. The *Gomez* court clarified that improperly admitted evidence has substantial weight if it goes to the core of the government's case; again, identifying a higher standard than that articulated by the Eleventh Circuit. *Id.* at 97.

It cannot be disputed that the informant's statements went to the core of the prosecution's case against Mr. Mason. Detective Renfroe, one of the key witnesses against Mr. Mason, testified regarding the entirety of his interactions with the informant, who was never identified, much less subjected to cross-examination. Further, the arrest and location of the murder weapon were the direct result of the informant's conversations with the police. The prosecutor repeated the informant's out-of-court statements throughout the guilt and sentencing phases, reminding the jury of the prosecution's key "evidence." Had the Eleventh Circuit considered the substantial impact of the informant's statements instead of simply considering the strength of other evidence, the panel would have come to the conclusion that

the Constitutional violation was not harmless. As discussed below, Mr. Mason's alleged use of any of the informant's statements does not cure the defect.

Finally, the State's claim that Mr. Mason did not raise the circuit split in his brief to the Eleventh Circuit is illogical and meritless. Resolving splits among the circuits is the principal responsibility of *this* Court; failing to identify a circuit split in briefing before a Court of Appeals does not preclude such review.

C. Mr. Mason's Claim That the State's Sixth Amendment Violation Was Not Harmless Has Merit

The State incorrectly addresses only a portion of the hearsay statements and utterly fails to consider the resulting prejudice of the remainder of the hearsay statements that Mr. Mason was "out to make a name for himself." Here, the prosecution improperly relied on the entirety of the hearsay, amplifying the error by arguing at sentencing that Mr. Mason "wants to write a book" and that he intended to profit from the crime. These arguments, which were unsupported by the record, served no purpose other than to inflame the jury and increase the likelihood of a sentence of death. Where, as here, the jury recommended death by the bare minimum vote of 10-2, the error in admitting the hearsay statements had a substantial and injurious influence on the jury's verdict and Mr. Mason's resulting death sentence. *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

Finally, there is simply no basis for the State's assertion that a Constitutional violation can in

any way be cured by Mr. Mason's assertions during the sentencing that, as a mitigating factor, he could not control his conduct. The hearsay statements that Mr. Mason was "out of control and out to make a name for himself," taken together with the prosecution's argument that Mr. Mason intended to write a book and profit from the crime, clearly showed an intent by the prosecution to paint Mr. Mason as a remorseless, publicity-seeking killer deserving of the death penalty. The judge's finding that Ms. Cagle was killed in an "execution-style" killing—despite no evidence to support this finding—show that the Constitutional violation had the very effect that the prosecution intended: to inflame the judge and jury to support a death sentence. That Mr. Mason had an impaired capacity to appreciate the criminality of his conduct or that he could not control his behavior due to his intoxication, is irrelevant to the analysis of whether the hearsay statements had a substantial and injurious influence on the judge and jury's assessment of aggravators and mitigators leading to Mr. Mason's death sentence.

II. THE ELEVENTH CIRCUIT'S DECISION DECLINING TO REVIEW MR. MASON'S *MIRANDA* CLAIM ON ITS MERITS WARRANTS THIS COURT'S REVIEW

The State argues that Mr. Mason's claim under *Miranda v. Arizona*, 384 U.S. 436 (1966), is procedurally defaulted because Alabama's "plain error" rule does not remove the bar to federal court review of procedurally defaulted claims. The State, however, misconstrues Mr. Mason's argument, which does not rely on the plain error rule

for the federal courts to reach the merits of his *Miranda* claim.

To properly preserve a claim for federal habeas review, this Court requires that a petitioner fairly present his claim to one full round of the state's established appellate review process. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Claims raised on federal habeas review, however, need not be identical to their counterparts raised in the state courts. *See, e.g., Green v. Nelson*, 595 F.3d 1245, 1254 (11th Cir. 2010) (language of federal and state habeas petitions need not be identical for fair presentment of claim); *Bright v. Williams*, 817 F.2d 1562, 1565 (11th Cir. 1987) ("Once the petitioner places the legal theory and supporting facts before the state court . . . he is not precluded from raising additional facts in support of his claim in a federal habeas petition."). Moreover, state court findings can indicate the fair presentment of a claim. *See Green*, 595 F.3d at 1254.

Mr. Mason fairly presented his *Miranda* claim to the Alabama state courts on direct appeal. Mr. Mason made a pre-trial suppression motion arguing "[t]he totality of the circumstances shows that the [alleged custodial] statement was involuntary and taken in violation of federal and state constitutional guarantees." R. 214. Extensive testimony was elicited at the hearing concerning the coercive and involuntary nature of Mr. Mason's alleged custodial statements. R. 597-756. Although the trial court denied Mr. Mason's motion without analysis (R. 755-56), the Court of Criminal Appeals made specific findings regarding Mr. Mason's *Miranda* claim: "The evidence established that the appellant was advised of his rights

three separate times, and that each time he knowingly and voluntarily waived his rights and spoke with the police. There was *no evidence that the appellant was under the influence of drugs, or that his confession was coerced by inducements or threats.*" App.81a (emphasis added). The Court of Criminal Appeals on a rehearing application and the Alabama Supreme Court reviewed and affirmed the Court of Criminal Appeals' decision. App.102a. The specificity of the Court of Criminal Appeals' erroneous finding that Mr. Mason was not under the influence of drugs and that Mr. Mason was not coerced by inducements or threats, shows that Mr. Mason indeed presented both the legal theory and supporting facts to the state courts.

The State's reliance on *Julius v. Johnson*, 840 F.2d 1533 (11th Cir. 1988), is misplaced. *Julius* held that the mere existence of a plain error rule does not preclude a finding of procedural default, and the assertion by an Alabama court that it did not find any errors upon its independent review of the record does not constitute a ruling on the merits of claims not raised in that court or in any court below. *Id.* at 1546. However, the petitioner in *Julius* conceded that he did not raise his claims at the appropriate time, and solely relied on the plain error rule to preserve his claims for federal habeas review. *Id.* at 1547. Here, at the very least, due to the specific nature of the Court of Criminal Appeals' finding, "there is some indication that the state court was aware of [the] issue," and thus Mr. Mason's *Miranda* claim falls outside of *Julius*' holding. *See id.* at 1546.

Accordingly, because Mr. Mason fairly presented his *Miranda* claim to the Alabama state courts on direct appeal, the federal courts should have considered this claim on its merits.

III. THE ELEVENTH CIRCUIT'S DECISION DENYING MR. MASON A CERTIFICATE OF APPEALABILITY ON SEVERAL OF HIS CONSTITUTIONAL CLAIMS MERITS THIS COURT'S REVIEW

A. The State Applies the Incorrect Standard of Review

The District Court, after denying Mr. Mason's habeas petition, denied Mr. Mason's application for a certificate of appealability ("COA") in its totality. Mr. Mason then applied to the Eleventh Circuit for a COA, which granted the application on several claims but denied the application with respect to several potentially meritorious claims, which required no additional factual development and were well-suited to federal appellate review. The State's opposition addressed each of the five claims Mr. Mason identified in his Petition for Certiorari separately; however, it applied the incorrect standard of review throughout.

A habeas petitioner seeking a COA is only required to demonstrate a substantial showing of the denial of a constitutional right. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). This Court has held that the standard is satisfied if reasonable jurists could find the district court's assessment of the claims to be debatable or wrong. *Id.* at 327, 338. The same standard applies to substantive claims and the district court's determination that

a claim has been procedurally defaulted. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The State, however, consistently refers this Court to the standard for granting a habeas petition, not the standard for granting a COA. The State argues that Mr. Mason did not demonstrate that "the State court's determination of this issue 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,' or 'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" Opp. at 23, citing 28 U.S.C. § 2254(d)(1)-(2).

The State has effectively put the cart before the horse. Mr. Mason does not argue in his Petition that habeas relief should be granted on his claims that the State exercised its peremptory challenges to exclude potential jurors on the basis of their race or gender, of prosecutorial misconduct, that the trial court's findings and jury instructions concerning aggravators and mitigators were erroneous, for ineffective assistance of counsel, and for an evidentiary hearing. Instead, Mr. Mason asks this Court to review whether the Eleventh Circuit properly denied a COA on those claims to allow Mr. Mason to argue them on appeal. When analyzed using the proper standard of review, it is clear that reasonable jurists could have debated the merits of these claims and whether they were preserved for federal habeas review.

B. The State Misrepresents the Record With Respect to Mr. Mason's Claims Regarding Jury Instructions on Aggravators and Mitigators

The State argues that Mr. Mason's claim that the trial court's jury instruction was improper because it did not instruct the jury that it had to find aggravators beyond a reasonable doubt was "raised for the first time in Mr. Mason's certiorari petition," Opp. at 26, and for that reason alone this Court should not review the claim. However, an accurate reading of the record reveals that Mr. Mason presented this issue on direct appeal to the Alabama state courts in the context of his ineffective assistance of trial counsel claim. R.E. 973, 1111, 1164. Mr. Mason also presented this claim to the District Court which determined this claim to have been defaulted, despite it having been presented on direct appeal. The State's suggestion that Mr. Mason had not previously presented this argument is simply not borne out by the record.

Based on the record as it stands, reasonable jurists could debate whether the claim was preserved for habeas review and whether the trial court's jury instructions improperly instructed the jury on the determination of aggravators and mitigators. Therefore, a COA was warranted on this claim.

IV. THE DETERMINATION THAT SEVERAL OF MR. MASON'S CLAIMS ARE PROCEDURALLY BARRED MERITS THIS COURT'S REVIEW

The District Court determined that several of Mr. Mason's meritorious claims were procedurally barred because his appeal of his Rule 32 petition was not timely; however, there is no adequate basis for barring federal habeas review of these claims because the procedural rules invoked were arbitrary, inconsistent or unpredictable. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958); *see also NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-302 (1964). While the State relies heavily on the fact that several Alabama state court cases have held that the procedural rules at issue were consistently and predictably applied, this Court has reached a different conclusion. This Court has determined it necessary to review these very rules when it recently granted the petition for certiorari in *Maples v. Allen*, No. 10-63, invoking similar principles and calling into question whether Mr. Maples should suffer the very prejudice Mr. Mason stands to suffer because of the arbitrary application of Alabama Rule of Criminal Procedure 32.1(f), which bars out-of-time appeals under circumstances such as Mr. Mason's, who was blameless for the missed deadline. If this Court does not grant Mr. Mason certiorari on this issue, at a minimum, this Court should stay this Petition pending the resolution of Mr. Maples' case.

CONCLUSION

The Petition should be granted.

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PETITION FOR REHEARING

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CAPITAL CASE

PETITION FOR REHEARING

Petitioner, Derrick O'Neal Mason, respectfully moves this Court for an Order vacating the denial of his Petition for Writ of Certiorari (the "Certiorari Petition"), entered on April 25, 2011 and granting the Certiorari Petition or, alternatively, holding the Certiorari Petition in abeyance pending this Court's disposition of *Maples v. Thomas*, 131 S. Ct. 1718 (2011). The federal habeas courts below in both *Maples* and the instant case held that certain of petitioners' serious constitutional claims were procedurally defaulted because of purported untimely appeals of Alabama trial court post-conviction orders. This Court granted certiorari in *Maples* to decide whether the State of Alabama may execute Mr. Maples without federal habeas review of his constitutional claims due to a missed appeal deadline that was no fault of the petitioner. Accordingly, as discussed below, this Court's resolution of the question presented in *Maples* will have direct bearing on the issues presented in Mr. Mason's Certiorari Petition, and require this Court to rehear the denial of certiorari in Mr. Mason's case.[1]

[1] According to Supreme Court Rule 44.2: "Any petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall . . . be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented." The below detailed analysis comparing *Maples* with Mr. Mason's case is presented to the Court for the first time in this Petition for Rehearing.

ARGUMENT

I. REHEARING SHOULD BE GRANTED TO PERMIT FURTHER CONSIDERATION FOLLOWING THIS COURT'S GRANT OF CERTIORARI IN *MAPLES*

Mr. Mason's Certiorari Petition involves the same procedural default issues raised in *Maples*. Accordingly, the Certiorari Petition should be granted or held in abeyance until *Maples* is decided.

A. As in *Maples*, Mr. Mason Demonstrated Sufficient Cause to Excuse Any Procedural Default

Mr. Mason showed cause for his purported out-of-time state post-conviction appeal on grounds substantially similar to those presented in *Maples*.

After appealing his criminal conviction through Alabama's direct appeal process, on August 1, 2001, Mr. Maples, through the law firm Sullivan & Cromwell, filed a petition for post-conviction relief under Ala. R. Crim. P. 32.1, raising ineffective assistance of counsel and other claims. Brief for Petitioner at 5-6, *Maples v. Thomas*, 131 S. Ct. 1718 (2011) (No. 10-63). On May 22, 2003, the trial court issued an order denying the petition. *Id.* at 6. Mr. Maples, however, did not receive timely notice of this order. *Id.* The trial court mailed copies of the order to Mr. Maples' counsel at Sullivan & Cromwell, but both attorneys representing Mr. Maples had left the firm and the order was returned to the trial court clerk unopened.

On August 13, 2003, about one month after the 42-day deadline to file a notice of appeal under Ala. R. App. P. 4(b)(1) had passed, the State's attorney sent a letter to Mr. Maples informing him of the denied Rule 32 petition. *Id.* at 7. Mr. Maples then immediately informed his family, who contacted Sullivan & Cromwell. *Id.* The firm sought leave to appeal notwithstanding the missed deadline, but the request was denied. *Id.*

On federal habeas review, the Northern District of Alabama and the Eleventh Circuit decided, among other things, that Mr. Maples' ineffective assistance of counsel claims were procedurally defaulted because Mr. Maples did not timely appeal the dismissal of his Rule 32 petition. *Maples v. Allen*, 586 F.3d 879, 885-92 (11th Cir. 2009). Mr. Maples then petitioned this Court for certiorari arguing, among other things, that Mr. Maples established cause for not following the state procedural rule setting the time to file an appeal and suffered prejudice as a result of his constitutional claims not being reviewed by the federal habeas courts. *Wainright v. Sykes*, 433 U.S. 72, 87 (1977) (holding that federal courts may excuse a default where the prisoner had "cause" for not following the state procedural rule and suffered prejudice); *see also House v. Bell*, 547 U.S. 518, 536 (2006).

On March 21, 2011, this Court granted certiorari in *Maples* on the following question:

> Whether the Eleventh Circuit properly held—in conflict with the decisions of this Court and other Courts—that there was no cause to excuse any procedural default where petitioner was blameless for the

> default, the State's own conduct contributed to the default, and petitioner's attorneys of record were no longer functioning as his agents at the time of any default.

Mr. Mason's appeal of the state trial court's dismissal of his Rule 32 petition involves similar issues. On June 16, 1995, Mr. Mason was convicted of the capital offense defined in Ala. Code § 13A-5-40(a)(2) (1975) in Madison County Circuit Court. R.E.418. On August 14, 1995, the trial court accepted the jury's 10-2 death sentence recommendation and sentenced Mr. Mason to death. R.E.419.

On March 6, 1998 and April 7, 2000, the Alabama Court of Criminal Appeals and the Alabama Supreme Court, respectively, affirmed Mr. Mason's conviction and death sentence. *Mason v. State*, 768 So. 2d 981 (Ala. Crim. App. 1998); *Ex Parte Mason*, 768 So. 2d 1008 (Ala. 2000). On November 13, 2000, this Court denied Mr. Mason's petition for a writ of certiorari. *Mason v. Alabama*, 531 U.S. 994 (2000).

On October 17, 2001, Mr. Mason filed a Rule 32 petition in Madison County Circuit Court. The trial court declined to conduct an evidentiary hearing and on August 5, 2004, denied Mr. Mason's Rule 32 petition by adopting the State's 63-page proposed order in its entirety. Due to the trial court's clerical error, however, neither Mr. Mason nor the State were notified of the disposition of Mr. Mason's petition until April 26, 2005, well after the time for Mr. Mason to appeal under Alabama law had expired. On May 27, 2005, Mr.

Mason filed a petition for writ of mandamus to the Honorable Bruce E. Williams, Circuit Judge for the Twenty-Third Judicial Circuit. Neither the trial court nor the State opposed the petition. On June 29, 2005, the Alabama Court of Criminal Appeals granted Mr. Mason's petition and ordered that the August 5th Order dismissing Mr. Mason's Rule 32 petition be vacated and a new order issued.

On July 7, 2005, the trial court once again entered the State's proposed order with the addition of an introductory section explaining the procedural posture described above. On July 14, 2005, Mr. Mason filed an Objection to the Court's Adoption of the State's Proposed Order Denying his Rule 32 Petition. The court overruled the Objection and denied the Rule 32 petition on July 29, 2005. Just 24 days later, on August 22, 2005, Mr. Mason filed a Notice of Appeal of the denial of his Rule 32 petition. As in *Maples*, the Alabama Court of Criminal Appeals dismissed Mr. Mason's Rule 32 appeal as untimely filed. App.112a. On August 18, 2006, the Supreme Court of Alabama denied certiorari with no analysis. App.113a.

Like Mr. Maples, Mr. Mason has demonstrated cause sufficient to excuse the purported out-of-time appeal. Mr. Mason is wholly blameless for the purported untimely appeal, which occurred due to the unconstitutionally flawed and inconsistent Alabama case law and rules concerning appealing an adverse Rule 32 order. In Alabama, a petitioner is required to object to a final order of dismissal at the trial level in order to preserve his claim that the dismissal was improper. *Pierce v. State*, 851 So. 2d 558, 574 (Ala. Crim. App. 1999),

rev'd on other grounds, *Ex parte Pierce*, 851 So. 2d 606 (Ala. 2000). Thus, a petitioner's claim of an erroneous dismissal is not ripe until his objection is overruled. Because a trial court is not required to rule on an objection within any specified period of time, under the Alabama Court of Criminal Appeals' calculation, a petitioner's time to appeal could run out before he ever received a ruling on a timely-filed objection, *i.e.* before his claim became ripe. Thus, the 42-day period under Ala. R. App. P. 4(b)(1) can only be logically counted from the time the appealable issue becomes ripe, upon the judge's overruling of the petitioner's objection. Of course, the issue will never ripen if the judge sustains the objection. The Alabama Court of Criminal Appeals erroneously dismissed Petitioner's appeal as untimely because it counted the 42-day time to appeal from a date when Petitioner's appeal was not yet ripe, namely, the date of the initial order rather than the date of the judge's final ruling on Mr. Mason's *Pierce* Objection.

In order for petitioners to have the full 42 days to appeal afforded by Ala. R. App. P. 4(b)(1), the time under those rules should be counted from the date the appeal becomes ripe, which is the date that the petitioner's *Pierce* Objection is overruled and denied. To calculate otherwise would put petitioners between the proverbial rock and hard place. For example, if Mr. Mason had filed his Notice of Appeal within 42 days from the time the first order was signed, and had not received a ruling on his Objection to the entry of the order, his appeal would have been dismissed under *Pierce* for failure to preserve his claims. Instead, Mr. Mason waited to file his Notice of Appeal until his claims were properly preserved and his appeal

was ripe; yet his due process rights were abrogated because the Court of Criminal Appeals ruled that his appeal was untimely, even though his appeal had been ripe for only 24 days. Had the Court of Criminal Appeals correctly tolled Mr. Mason's time to appeal under Ala. R. App. P. 4(b)(1) until the trial court decided his Objection, Mr. Mason's Notice of Appeal would have been timely filed.

The State's case law and procedural scheme concerning the time to appeal a Rule 32 petition under Ala. R. App. P. 4(b)(1) is constitutionally flawed. It shrinks the 42-day period for all petitioners because the disposition of the required *Pierce* Objection will never be made and decided on the same day the denial of the Rule 32 petition is signed. Moreover, petitioners who do not receive rulings on their required *Pierce* Objections before the expiration of the appeal period will be entirely barred from seeking review. Thus, no petitioner ever has the full 42 days afforded by Ala. R. App. P. 4(b)(1).

Accordingly, Mr. Mason demonstrated the same "cause" for filing a purported out-of-time Rule 32 appeal as demonstrated in *Maples*. Petitioner himself was not at fault for the purported out-of-time appeal; he instructed his counsel to file the Notice of Appeal and believed that they had complied with his instructions. *See Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010) (if a missed deadline cannot be constructively attributed to the petitioner, remedies such as equitable tolling are available). The State is to blame due to the unconstitutional and incongruent Alabama case law and rules regarding the time to appeal under Ala. R. App. P.

4(b)(1). The State's byzantine post-conviction appellate mechanisms, akin to interference by state officials, are objective factors that impeded counsel's efforts to file an unequivocally timely appeal. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). Identical to the issue now before this Court in *Maples*, Mr. Mason must not be held responsible for a purported missed deadline at no fault of his own.

B. Petitioner Suffered Significant Prejudice Resulting From His Constitutional Claims Not Being Reviewed by the State Post-Conviction and Federal Habeas Courts

Mr. Mason has suffered significant prejudice due to failure of the Alabama appellate courts on collateral review and the federal courts to consider his serious constitutional claims because of the purported out-of-time Rule 32 appeal, in particular because Mr. Mason has not been provided the opportunity to develop the facts of these claims during state post-conviction or federal habeas proceedings.

First and foremost, rather than conducting an independent and objective evaluation of the merits of Mr. Mason's claims, the Rule 32 trial court adopted verbatim the State's proposed order in denying Mr. Mason's Rule 32 petition. This practice has been frowned upon by the Alabama courts and this Court for years,[2] and is now improper in

[2] *See, e.g., Anderson v. Bessemer City*, 470 U.S. 564, 572-73 (1985) (noting Court's prior criticism of verbatim adoption of findings of fact prepared by prevailing party); *Weeks v. State*, 568 So. 2d 864, 865 (Ala. Crim. App. 1989)

Alabama as a matter of law. *Ex parte Scott*, No. 1091275, 2011 WL 925761 (Ala. Mar. 18, 2011) (remanding case to Rule 32 trial court because trial court adopted the State's proposed order near verbatim in denying petitioner's Rule 32 petition). The Court of Criminal Appeals in Mr. Mason's case never reached this issue because it denied Mr. Mason's Rule 32 appeal as untimely, thus costing Mr. Mason the opportunity of an independent and objective evaluation of the merits by any court of his Rule 32 claims.

To make matters worse, Mr. Mason's purportedly untimely Rule 32 appeal has been relied upon by the federal habeas courts below in refusing to consider his serious constitutional claims on their merits. Mr. Mason contends that his trial counsel failed to, among other things, adequately investigate, prepare for and present mitigating evidence during the sentencing phase of his trial, including Mr. Mason's mental health history, mother's use of drugs and alcohol during pregnancy, and involuntary intoxication at the time of the crime. The District Court refused to consider the merits of this claim because, according to the District Court, these allegations were first raised in Mr. Mason's Rule 32 petition, the denial of which was not timely appealed. App.236a-238a. The Eleventh Circuit denied Mr. Mason's request for a certificate of appealability on this claim. Had this mitigating evidence been presented to the trial court during Mr. Mason's sentencing hearing, Mr. Mason likely would not have been sentenced

("[W]e issue a caution that courts should be reluctant to adopt verbatim the findings of fact and conclusions of law prepared by the prevailing party.").

to death. The federal habeas courts in *Maples* also refused to consider the merits of similar ineffective assistance of counsel claims because of Mr. Maples' purported out-of-time Rule 32 appeal. *Maples*, 586 F.3d at 884.

Mr. Mason's prejudice is even more severe than Mr. Maples', as the federal courts below refused to hear several other of Mr. Mason's meritorious constitutional claims, deciding they were procedurally defaulted due to Mr. Mason's purported out-of-time Rule 32 appeal. Along with ineffective assistance of counsel, the District Court also refused to hear on the merits Mr. Mason's claims that: (1) the trial court erroneously instructed the jury at both the guilt and sentencing phases; (2) the trial court erred admitting into evidence highly prejudicial expert testimony; (3) Mr. Mason's custodial statements were coerced and involuntary in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); (4) the prosecution argued certain facts not in the record during both the guilt and sentencing phases of Mr. Mason's trial; (5) the prosecution struck jurors on account of race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986); and (6) his sentence of death is unconstitutional because it was sought and imposed pursuant to a pattern of racial bias in imposition of the death penalty. App.169a-174a, 178a-185a, 222a, 225a-226a, 231a-235a, 251a-252a. Out of these purportedly procedurally defaulted claims, the Eleventh Circuit granted Mr. Mason a certificate of appealability only on his *Miranda* claim, but agreed with the District Court's procedural default analysis. App.10a-11a.

The failure of the federal courts below to review these serious constitutional claims on their merits is prejudice enough to excuse any procedural default, but such failure is particularly prejudicial here where the Eleventh Circuit found a constitutional Confrontation Clause violation, but decided it was harmless because the other evidence was sufficient to sustain a guilty verdict and sentence of death. App.15a-17a. Merits review of the litany of serious constitutional claims presented by Mr. Mason above would result in more than a reasonable probability that the violation of Mr. Mason's Confrontation Clause rights was not harmless, entitling Mr. Mason to habeas relief.

II. EQUITABLE PRINCIPLES REQUIRE REHEARING

Mr. Mason has presented several strong and serious constitutional claims that warrant habeas relief. Those claims should have been reviewed on their merits by the federal courts below because Mr. Mason presented sufficient "cause and prejudice" to excuse the purported untimely appeal of the trial court's dismissal of his Rule 32 petition. The fact that a man may be executed in these circumstances without any federal merits review of those claims—in particular the denial of constitutionally guaranteed assistance of counsel at trial, which resulted in the bare minimum verdict necessary to impose the death sentence, and rendered such sentence wholly unreliable—may call into question the legitimacy of the system of capital punishment and "transgress the constitutional commitment to decency and restraint," *Kennedy v.*

Louisiana, 554 U.S. 407, 420 (2008), and certainly warrants this Court's review.

Moreover, decisions of this Court have emphasized that "[h]abeas corpus is 'governed by equitable principles.'" *Munaf v. Geren*, 128 S. Ct. 2207, 2200 (2008) (citation omitted); *see also Holland*, 130 S. Ct. at 2562. This Court maintains equitable discretion to correct a miscarriage of justice, including the power to over look a petitioner's state procedural default. *Dugger v. Adams*, 489 U.S. 401, 410 (1989). Denying an indigent death-row prisoner access to federal courts with respect to serious constitutional claims because of a purported missed deadline, not the fault of Mr. Mason, is fundamentally unjust and incompatible with the equitable principles on which habeas corpus is grounded, if not the Constitution itself.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Certiorari Petition, Mr. Mason respectfully requests that this Court grant rehearing of the Order denying the Certiorari Petition, vacate that Order, and grant the Certiorari Petition or, alternatively, hold Mr. Mason's case in abeyance pending a decision by this Court in *Maples*.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Supreme Court Rule 44.2.

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